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ESSAY

UPON THE

LAW OF CONTRACTS

AND

AGREEMENTS.

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By JOHN JOSEPH POWELL, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

Ista veritas, etiamsi jucunda non est, mihi tamen grata est.

*"To me, more grateful nothing is I ween, Cic!
Than truth, of less so frightful voice or mien." Old Play*

IN TWO VOLUMES.

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TO THE

R E A D E R.

VARIOUS and important as are the topics which present themselves to a student of the law of *England*, there does not appear to me any which opens so wide and extensive a field for investigation, as that which is the subject of the following Essay. *Contracts* comprehend the whole business of human negotiations. They are applicable to the correspondence of nations, as well as to the concerns of domestic life. They include every change and relation of private property, and consequently furnish the principal subject, on which all legal and equitable jurisdiction is exercised.

But however different the objects, the contracts respecting them must uniformly be determined by the principles of natural or civil equity. Yet, although many works are extant,

both in our own and foreign languages, in which those principles are applied to the rights and usages of other communities, no treatise has hitherto appeared, written professedly to shew the connexion between those general principles, and the laws of property in *England*.

In order, therefore, to exhibit in a compact and systematical form, the authorities extant in our books upon this subject, and by comparing them together, and examining their respective dependencies, relations, and consequences, to discover the general rules and principles of natural and civil equity on which those decisions are founded, I was induced, at an early period, among other objects, to undertake that course of reading, on which I laid the foundation of the following tracts. Satisfied that in this branch of the law, as in every other part of science, the primary object was to establish a proper and solid ground-work, by obtaining a thorough acquaintance with the principles by which it is governed.

In pursuing this plan, I sought for no doubtful points to examine, obscurities to elucidate, or errors to detect; but when, in the process of this work, such difficulties presented themselves, I was not deterred, by the influence of names, from canvassing, explaining, and exposing them to the reader.

Perhaps

Perhaps there may be some, to whom such conduct may appear not strictly justifiable, as tending to diminish that respect with which we ought to look up to those, whose duty it is to administer the laws, in a well-regulated state : I confess, my mind is impressed with a different opinion ; I cannot conceive it possible if, in taking a comprehensive view of the numerous decisions which have been made in this extensive branch of the Law, one or two instances should occur wherein analogy may have been overlooked, or principle disregarded, it will furnish any imputation on the wisdom, integrity, or diligence of those who sat in judgment on such occasions. On the contrary, I was astonished to find, that an attentive examination should not have discovered among the almost innumerable questions of property, which the extensive reciprocal intercourse of this great and commercial empire cause to be judicially agitated, not more than one or two errors in judgment, and the developement of which (if they should be admitted to be errors) can be attended with no other very important advantages, except the preservation of uniformity in legal determinations, could be discovered.

All reasoning must be founded on first principles. The science of the Law derives its principles

principles either from that artificial system which was incidental to the introduction of feuds, or from the science of morals. And, without a knowledge of these principles, we can no more establish a conclusion in law, than we can see with our eyes shut, measure without a standard, or count without arithmetic.

If the preceding observations be founded in truth, and all general science be reducible into first principles, the same remark will likewise apply to every distinct branch of each particular science. Thus the law will have its principles of descent, its principles of purchase, its principles of representation, its principles of construction of instruments. For instance, it is a rule of construction that were, in several instruments made *in pari materia*, different words are used importing ideas of different things, *those words* shall not be taken to mean the same thing: Thus were one act of parliament made to regulate gaming, speaks of a gaming contract, and a subsequent act of parliament, made likewise to regulate gaming, speaks of a security taken at the time of gaming, the one act has been expounded to intend the contract, and the other only the security: Now this conclusion must have been founded upon some principle, on which it must ultimately rest. I take the principle to have been this, that as, in a formal instrument,

instrument, made with deliberation, in which language is used technically, the same words must be taken to import the same signification throughout, so, in such instruments, a different penning must be taken to import a different meaning or signification. This must be allowed as a self-evident principle, as it is one, without the admission of which, there could be no rule to find out the true and genuine sense of language. If this be conceded, it follows of course, that wherever an instrument or instruments, in which the same circumstance occurs, is or are to be discussed and construed, recourse must be had to this principle, and all our conclusions upon the import of words, expressing different ideas, must be established on its basis. This proposition cannot be denied, without denying the axiom in logic; that in reasoning, the same consequences will, in all cases, invariably follow from the same premisses; I have therefore ventured, where this truth has been neglected, to expose the defect, and for the sake of analogy, without a due attention to which the law must cease to be a rational and demonstrative science, to contend even against authority, when so circumstanced, as appearing to me not to be founded in law.

If I have argued against the propriety, or strict legality of blending together legal and equitable
rights,

rights, as an innovation upon our system of jurisprudence, and subversive of its first principles ; it has not proceeded from a disposition, in itself inimical to such temporary modifications of the law, as must and ought to be made to fit it to the exigencies of civil society, at different periods and under varying circumstances ; but from a conviction that this secondary principle of accommodation, must not be extended so far, as to permit the warping of fundamental principles, to which we must adhere with a sacred veneration, if we wish to preserve that constitution of government under which we have the happiness to live. For what security has the constitution, if it be not in the *internal policy* of our country, exhibited in that wise and benevolent administration of commutative justice, according to those great principles and maxims of law and equity, which have been ratified by the sanction of successive ages ? *QUOD BONI EST JUDICIS AMPLIARE JURISDICTIONEM*, is a wise maxim, *when properly understood*. Taken in its *true* and *genuine* sense it means, that a judge should so model and adapt the rules and principles of justice to the exigencies of mankind, that they may accommodate all times, manners and circumstances. But a power to model and adapt, by no means involves a power to create or annihilate. The former belongs to construction, the latter to legislation. That a
right

right in itself purely legal cannot be the proper subject of discussion in a jurisdiction purely equitable, and that a right purely equitable, cannot be the proper subject of a purely legal jurisdiction, are axioms which cannot be denied, so long as the law recognizes a distinction between legal and equitable rights. It is a proposition as self-evident, as that blue is not red, or white black.

Every man who is acquainted with the law of *England*, knows that law and equity, although they aim at the same end, which is to do justice, are distinctly administered in their respective courts, by their particular judges, and rules of justice. The chancellor is invested with an extraordinary and uncontrollable power to judge according to that which is alledged and proved. He has authority to direct the use of a legal right to an equitable purpose, if he can obtain evidence of facts, which prove, that in *conscience* it ought to be so applied; but the judges of the common law have no such authority, they are to judge according to a strict and ordinary or limited power. So long as these jurisdictions continue distinct, so long must the rights also over which they have jurisdiction. A pure trust may be judged of at law, but it must be executed in equity. The rules of law and equity cannot be guided by the fallibility of men; it
would

would be destructive to the interest of the community that they should. For whatever plausible reasons of convenience or expediency may be offered to the contrary, they will be found, on investigation, referable only to particular instances. But it is absolutely necessary for the advantage of the public at large, that the rights of the subject should, when agitated in a court of law, depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied there, must be arbitrary and uncertain, depending, in the extent of their application, upon the will and caprice of the judge.

If the mind of a man of common sense and information is not as much startled, when he hears a court of law giving a remedy for the recovery of a debt against a married woman, by the ordinary course of legal process against her person and separate estate, as he would be were he witness of such court adjudging the specific execution of a contract, directing the performance of a trust, controuling the use to be made of a judgment at law, or guiding the conscience of a party to whom fraud is imputable; it is not, because the principles of the law are not as grossly violated in the one case as in the other, but because the opinion, that such a woman can have no property or liability but what is found-
ed

ed upon a trust, is not immediately obvious to one not intimately acquainted with technical learning. If he were made to comprehend that such an adjudication cannot be given without violating a legal principle coeval with the existence of the common law, *that a feme covert can have no legal property, and has lost all ability to contract*; he would see that it was a legal conclusion without legal premisses to support it, that it was a building without a foundation. He would then be alarmed at such a judgment, as assuming the shape of a legislative not a judicial act. But if he were instructed a little further, that such debt arose out of an annuity contract, his surprise would be still greater; for he would then perceive, that a court of law had not only taken upon itself to bind a person to a contract, who at law had no capacity of contracting, but to direct the application of a trust fund, and to enforce a right, unattainable but in equity, of a nature which a court of equity sets its face against, as founded upon a contract unequal and destructive to one of the parties. He would discover, on the part of a court of law, an equitable adjudication binding an equitable right, in favour of a mere legal claimant, having no equitable principle in his favor. If a judgment, founded upon these premisses, can be deemed law, all reasoning upon legal and equitable right is at an end, no distinction subsists between them.

them. Such an adjudication must be abandoned, or rest upon the maxim "*stet pro ratione voluntas*," against the introduction of which maxim into our law, (which those who have been best acquainted with it, have entitled the perfection of reason) the country would, there can be no doubt, enter an eternal protest, and exclaim with the barons of old "NOLUMUS LEGES ANGLIÆ MUTARI."

I thought it expedient to submit these observations to the reader, as my excuse for arresting his attention in the discussion of some subjects in the following tract, which, if the sanction of a few years can bear down that of ages, must be deemed law at this day, but which, in an essay of this nature, whose object is to developé principles, could not be passed over without investigation.

It behoves me likewise to mention one other circumstance, which is, that the reader will find many of the observations and general remarks, here submitted to his consideration, have been taken as well from the civil law writers, as from those who have discussed the theory of the laws of nature and nations, to which I frequently resorted, knowing them to have been the sources, from which those great and distinguished characters, who laid the foundation of that noble superstructure,

perstructure, the system of equity, as now administered in this country, evidently received most essential assistance. But I did not deem it necessary to refer to the passages particularly, as they do not derive their authority in our law, from their being to be found in the Code, or the Digest, in Grotius, or in Puffendorfe, but from being recognized in our own courts.

With these remarks I shall leave the work to its fate, under a confidence that it will meet the same candid reception, with which the profession have honored the former productions of the author.

CAREY-STREET,
Lincoln's Inn Fields.

1790.

CON-

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INTRODUCTION.

On the Primitive State of Property.

MEN originally possessed all things in common. In this state every one converted whatever his occasions required to his own use. This injured no man, since there was then more than sufficient to answer the exigencies of all.

The exercise of this common right in a state of nature, stood in the place of that right of property which subsists in a civilized state; for no man could then *justly* take from another, that which another had first taken to himself. But if the first taker afterwards abandoned it, others might make use of it in their turn. But during the occupation of the first taker, he acquired a right, by virtue of which he was entitled to prevent others from interrupting him in the enjoyment of that, of which their *Creator had granted them the common use. This state is well illustrated by the simile of a theatre, which though open for every person that comes, yet the place in which any individual sits, is, in a proper and peculiar sense, his own; for the moment any place is filled, nobody has a right to remove the occupier for the purpose of seizing it for himself.

[* ii.]

Such was the condition of man with respect to land, while he continued in a pastoral state; for the individual was only entitled to the *possession* of the spot, which was in the immediate occupation of his herds and flocks. But necessity, and the sagacity of man, soon suggested, and opened to his view, the advantages that might be derived from the cultivation of the ground. When an individual had bestowed a portion of his labour, on a particular spot, and thereby rendered it more productive than it was in a state of nature, the idea was easily adopted, that his right to that spot did not expire with every temporary dereliction of possession; he was entitled to the produce in the course of the seasons. This led to the division of the land. Then portions of it were in the first instance distributed among the nations of the earth, and afterwards by a

ON THE PRIMITIVE STATE

[* iii.] progressive * subdivision assigned to tribes, families, and individuals.

To effectuate the still further advance of civilization, labour and industry were necessary; which led to variety of inventions, by which the gifts of nature were made to contribute in a far greater degree to the conveniencies of life, than they were capable of doing in their primitively uncultivated state. Then the ancient community of goods was no longer consistent with that equity which in a state of nature required an equality of distribution. Things derived an accession of value from labour which they had not in their primitive state; and it was just that the produce of each man's industry should be so far his own, that no other should share the benefit of it, without his permission. New ideas of property then necessarily presented themselves to the mind, whereby every one, who possessed himself of things which he improved by his labour and industry, was considered as having thereby acquired a right to retain them as his own, although they were not necessary to his immediate use; unless he disposed of them at his will and pleasure to others. This laid the foundation on which exclusive property in *moveable goods was established by civil laws, of which the characteristic is, that others are *always* excluded; whereas in a communion of goods (i. e. in a state of nature) others are not excluded from things, of which any one is possessed, except *so long* as they are in the actual use of the present occupier. In an advanced state of society, this right of exclusive enjoyment is confirmed and modified in various ways, by laws made for that purpose.

[* iv.]

Now as things which were the objects of property were of different natures, administering in different ways to the necessity and convenience of men, it happened that the individual had sometimes more things of one kind and fewer of another than his occasions required. He found it therefore convenient to exchange those things of which he had a superfluity, for those in which he was deficient. Hence originated traffic, which is a necessary consequence of property in goods, and reciprocal accommodation. But the commutation of commodities being, in the course of time, found inadequate to the various, and combined transactions to which society gave rise, it became necessary to agree on some common measure by which things, different

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different *in their nature, might be compared together, [* v.] and made equivalent to one another. To answer this end, men agreed to place an imaginary value on such permanent substances, as might become the standard of comparison between the different articles of property; and metals being found the most generally convenient for this purpose, they were adopted as the medium of exchange. Thus was money introduced, which has furnished private people with the means of extending their possessions; and rendered practicable that unequal division of property, which we now see prevail.

The discovery and adoption of this medium of value, money, enabling men to encrease their possessions both of real and personal things in an extent not practicable before its introduction, and consequently enlarging the notion of possessing accumulated property, put an end, in great measure, to the original mode of acquisition, by taking possession of that which belonged to no man, which act we have seen was the foundation of all individual property, and consequently, of all derivative acquisition.

* A thing may become ours, from a derivative acquisition, either by virtue of some act of another, or by virtue of some positive institution. [* vi.]

The former of these modes of derivative acquisition will alone be material for our present consideration.

Derivative acquisition, by virtue of some act of another, is effected by contract.

A contract, according to the common law definition of it, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. But, by the writers upon general law, it is defined to be, "*Duorum pluriumve in idem placitum consensus, obligationis licite constituendæ vel tollendæ causa datus;*" that is, the consent of two or more persons in the same thing, given with the intention of constituting, or dissolving lawfully some obligation. Perhaps the following description will be deemed more simple than either. "A contract is a transaction in which each

ON THE PRIMITIVE STATE, &c.

- [* vii.] party comes under an obligation to the *other, and each, reciprocally, acquires a right to what is promised by the other."

It is evident that, under these definitions of a contract, every feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, promise, &c. may be included; for, in all these transactions, there is a mutual consent of the minds of the parties concerned in them, upon agreement between them, respecting some property or right that is the object of stipulation.

The ingredients requisite to form a contract are, First, Parties. Secondly, Consent. Thirdly, An obligation to be constituted or dissolved.

- [* viii.] That these things must coincide, is evident from the very nature and essence of a contract: for the regular effect of all contracts being on one side to acquire, and on the other to part with or alien some property, or to abridge and restrain natural liberty by binding the parties, or one of them, to do, or restraining them, or one of them, from doing, something which before he might have done, or omitted doing, at his pleasure, it is necessary * that the party to be bound, shall have given his free assent to what is imposed upon him.

This mode of considering contracts is agreeable to the Roman law, which says: "In omnibus rebus, quæ dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium; nam sive ea venditio, sive donatio, sive conductio, sive quælibet alia causa contrahendi fuit, nisi animus utriusque consentit, perducere ad effectum id quod inchoatur non potest." And no contract can be said to be strictly such, unless the party assenting be under an obligation to perform that, to which he has assented.

These observations lead us, First, to the consideration of what persons have a capacity to assent, so as to oblige themselves, or others, by agreement. And, secondly, what circumstances are necessary to conclude that the parties to a contract have assented, and thereby constituted a perfect obligation.

* Of the Assent to Contracts or Agreements, and the Power residing in different Persons, as moral Agents, to bind themselves and others. [*9]

WE have already suggested, that it is of the *essence* of every contract or agreement, that the parties to be bound thereby should consent to whatever is stipulated; for, otherwise, no obligation can be contracted, or concomitant right created. I shall, therefore, consider,

First; What persons are capable of binding themselves by their contracts or agreements.

Secondly; What persons are capable of binding themselves, and also others, by their contracts or agreements.

Thirdly; In how many ways an assent to a contract or agreement may be given.

* And, fourthly; What circumstances invalidate such assent. [*10]

First. In order to ascertain what persons have a moral power to bind themselves by their contracts and agreements, we must consider what we mean by the term "Assent." Now the term "*assent*" signifies the acquiescence of the mind to something proposed or affirmed; and involves, in consideration of law, first, a physical power of assenting; secondly, a moral power; and, thirdly, a deliberate and free use of those powers. Therefore the absence of any of these capacities in either of the parties to a contract or agreement, renders the person labouring under it incapable of entering into an agreement to bind himself, or, by virtue of his acts, others.

It is evident then, that a man who is not perfectly master of his reason, is incapable of giving a serious and valid assent to a contract or agreement thereby to bind *himself*; because such assent is an act of the understanding, of which persons so circumstanced are morally incapable, their actions being the result of an *irresistible* impulse, the power, of self-government being

Seiden & Lunan

OF THE ASSENT TO CONTRACTS

[* 11.]

Instit. lib. 3.
tit. 20. de inu-
tit. Stipul. 8.
Furiolē.
4 Rep. 126.
Perk. sect. 21.
Finch. 102.
2 Roll Abr.
728.

4 Rep. 123.
Show. Pari. Ca.
152.

[* 12.]

Thompson v.
Leach, 3 Mod.
296—301.
S. C. Saist. 576.
L. Ray. 316.
3 Lev. 284.
2 Vent. 198.
Comb. 438, 468.
Carth. 211,
250, 435.
Attorney Gen.
v. Parkhurst,
1 Chan Ca.
113.

Co. L. 2. b.
Bac. Abr. 84.
2 Vent. 203.

ing wanting. In this respect, idiots * and lunatics are incapable of entering into contracts or agreements to bind *themselves* or their *own* property, the *essence* of a contract being, in such cases, wanting on their parts, their acts, if disadvantageous to themselves, not being to be imputed to them, but to their disease. It was therefore held in the Roman law, *quod furiosus nullum negotium gerere potest, quia non intelligit quod agit*. According to the law of England, also, all deeds, gifts, grants, and conveyances, not of record, made by persons of these descriptions, with a view to transfer their property, whether real or personal, are actually void; because such disabilities do not discharge or annul, but make the contract absolutely inoperative *ab initio*. And those cases, wherein it has been held that the deeds of such persons are not void, but voidable, proceed only upon the notion that *non est factum* cannot be pleaded to them, because they have the form, though not the operation of deeds, and, therefore, are not void (*that is*, as not being deeds) without shewing the special matter which makes them, notwithstanding their form, of no efficacy in fact. But the better opinion seems to be, that, as such an imbecillity goes to the gift of the action, and proves the contract a nullity, it may be taken * advantage of on the general issue.— Thus it is laid down by *Astton*, 39 H. 6. 42 b. that a warranty, entered into in a deed by one *non compos*, is *actually* void, because the deed is void.

So it was adjudged in the court of King's Bench, in the case of *Thompson and Leach*, that a surrender by a person *non compos* being actually void, a contingent remainder, depending upon the estate of the person *non compos*, was not destroyed by such surrender.

And where it appeared on a suit in chancery, instituted on behalf of a lunatic, that the defendant therein had conveyed lands to the lunatic, in consideration of which, the lunatic had assigned to him a security for money to satisfy him the purchase money; the court directed the defendant to account for the money, and to pay the same with damages.

But, although, in an abstract view, and considering the point merely in a moral light, and according to the nature of things, property cannot be acquired *originally* by one deprived of reason; because, in this method of acquiring property, the acquirer must be capable of

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* of a volition, or intention to take possession of, and hold such a thing as his own, which is the foundation of his right; yet, by the law of England, (which, in that respect, agrees with the law of most civilized states) persons labouring under insanity are considered as competent to acquire property from others by a derivative title; for, though, in this case likewise, to give effect to a transfer of property from one to another, it is required, in the common course of things, that the party receiving be capable of judging of, and assenting by proper signs to receive, what is transferred; yet, as the granting party is capable of assenting and thereby binding himself, the law is satisfied, *prima facie*, with the presumed assent to receive what it is intended will be beneficial, and adjudges this equivalent to a formal assent to accept, so far as such assent is necessary to give efficacy to a contract, and to vest the property transferred, in persons so circumstanced. And if such persons obtain or recover their intellects *and agree thereto*, such acceptance becomes binding; but if they die during their incapacity, or recover their intellects, and die without agreement, their heirs may avoid such acceptance; for they shall not be bound by the contracts or agreements of * persons who, in fact, want capacity or power to contract.

[* 13.]

However, notwithstanding the contracts and agreements of persons *non compos* to alien their property be void, and this even as to themselves; yet the better opinion is, that persons, so circumstanced, cannot, *themselves*, when they recover their intellects, take advantage of their own incapacity.

[* 14.]

Those, who contend that a person *non compos* may, on his recovery, defend himself from his contracts by pleading his incapacity, found the proposition they maintain on the authority of the *Registrum brevium*, in which there is a writ for *the alienor himself* to recover lands aliened by him during his insanity, *dum fuit non compos mentis suæ, ut dicit, &c.*; on the authority of *C. 28. fol. 66. Britton*, who states, that insanity *was* a sufficient plea for a man to avoid his own bond; and on the reasoning used by *Fitzherbert* in his *Natura Brevium*, where he contends, "that it stands with reason that a man should shew how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time; and compares this case with that of an infant

Fol. 228.

C. 28. fol. 66.

Fol. 466.

OF THE ASSENT TO CONTRACTS

[* 15.]

fant who * may avoid his feoffment, grant, or lease, as well within age as of full age." And further argues, "that the case of the *non compos* is stronger in law than the case of the infant, because the infant is considered, in law, as *having a discretion* so as to subject him to be responsible for crimes, whereas the *non compos* hath *no manner of discretion*; for that if he kill a man, it is no felony, nor shall it subject him to any forfeiture."

[* 16.]

Those who maintain the contrary proposition, rely upon the cases to be found in the year-books during the reign of Edward the Third, from which it appears to have been the opinion of the judges at that period, that no such plea was admissible; for in Mich. 5 E. 3. Pl. 131. *Herle* says, that such an issue in law, as that, at the time of the obligation made, the obligor was of *non-sane* memory, cannot be received; and 35 Ass. Pl. 10. of rent, on a release of the plaintiff pleaded in bar, to which he replied, that he was of *non sane memory* at the time of making it; it is said per *Monbray*, you shall not have a writ of *dum non fuit compos mentis* of your own seisin, &c. nor, by consequence, such plea; and he said, that the judges, having been spoken to, were of the * same opinion: But the cause was adjourned, and no more is to be found respecting it. And, in the 29th. Hen. 6. on a question, whether the heir of one who had aliened when of *non-sane memory* could defeat the same by entry without action, *Prifot* lays it down as settled law, *that the ancestor himself could not have defeated his feoffment by action or entry*; because the law would not suffer him to disable himself: and he took a distinction between this case and the case of infancy, of which the feoffor might himself take advantage: and, upon the principle above-mentioned, the whole court were clearly of opinion with *Prifot* as to the point we are now discussing. Accordingly, *Littleton* (who lived in the reigns of Henry the 6th, and Edward the 4th, and writ his book on Tenures in the 14th year of the latter prince's reign) stating (sect. 405) the right of the heir of a man of *non-sane* memory to enter into the lands of his ancestor notwithstanding a descent cast, uses the following strong language as to the point in question. "And in this you may see a case where the heir may enter, and yet his ancestor, which had the same title, could not enter. For he which was out of his memory at the time of such descent, if he will enter after such a descent, if an

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an * action upon this be sued against him, he hath [* 17.] nothing to plead for himself or to help him, but to say, that he was not of *sane memory* at the time of such descent, &c. *And he shall not be received to say this, for that no man of full age shall be received in any plea by the law TO DISABLE HIS OWN PERSON*, but the heir may well disable the person of his ancestor for his own advantage in such case; for that no laches may be adjudged in him which hath no discretion in such case." And (section 406) he proceeds thus: "And if such a man of *non-sane memory* make a feoffment, &c. he himself cannot enter, nor have a writ *dum non fuit compos mentis*, &c. *causa qua supra*; but, after his death, his heir may well enter, or have this writ, at his choice."

This conclusion of *Littleton*, in which he is supported by Lord *Coke* (after an examination of all the authorities, and all the elementary writers before his time) is further corroborated by several decisions reported in *Croke Elizabeth*, which, from their having been decided so near the period in which *Fitzherbert* wrote his *Natura Brevium* (which was in the time of *Henry the 8th*) furnish a strong ground to doubt, whether this rule was not, * at that time, settled, notwithstanding [* 18.] *Fitzherbert* reasons strongly against it.

The first case, I allude to, is that of *Stroud and Marshal*, where debt was brought upon an obligation, and the defendant pleaded, that, at the time of the obligation made, he was *de non-sane memory*; and it was, on demurrer, adjudged to be no plea. Stroud v. Marshal, Cro. Eliz. 398.

And in the case of *Crofs and Andrews* (in the same reporter, during the same reign) in which an action upon the case was brought against an innkeeper, wherein the plaintiff declared on the common custom of the realm, that an innkeeper should keep the goods of his guests safely; the defendant pleaded, that when the plaintiff lodged with him, he was sick and of *non-sane memory*, by occasion of his indisposition; and this plea, on demurrer, was held bad. And one reason given was, that it did not lie with an innkeeper to say, he was of *non-sane memory* on this action, any more than in debt on an obligation. Crofs v. Andrews, Cro. Eliz. 622. S. C. 1 Roll Abr. 2. D. 2.

To these authorities may be added *Beverley's case*, wherein it is stated, that two points, upon argument, Beverley's case, 4 Rep. 123.
and

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[* 19.] and on good consideration, * were unanimously resolved *per totam curiam*, 1st. That every deed, feoffment, or grant, which any man *non compos* makes, is avoidable, and yet shall not be avoided by himself; because it is a maxim in law, that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. 2d. If the common law had given a writ of *non compos mentis* to him who has recovered his memory after alienation, certainly it would have given him remedy for the maintenance of himself, his wife, children, and family, although he recovered not his memory, but continued *non compos mentis*.

However, notwithstanding the weight of the authorities I have cited, it might be contended, if the reason of the thing were of that side the question, that the writ in the *Registrum Brevium* evinces, that the ancient common law recognized this kind of plea by the party *non compos* himself, and that the cases, however numerous, being founded on a mistaken notion, are not of sufficient weight to counteract the evidence of such a writ in that valuable repository. But upon a fair [* 20.] *investigation of the question, it appears to me, that, according to the spirit of the common law, the strongest arguments will be found against receiving such a plea. *Fitzherbert*, who contends most strongly in favour of its admission, founds his argument, in defence of that proposition, principally, on the analogy between the case of insanity and the cases of infancy and duress: but there seems to be a wide difference in the nature of the disqualifications; for infancy and duress are facts capable of being proved without having recourse to the actions of the parties meant to be disqualified. They cannot be assumed where they do not really exist. But insanity, being a quality annexed to the mind of the party who is subject to it, is a conclusion upon his state of mind to be drawn only from his own actions. A person therefore may assume this disability, whereas he cannot feign the other, the proof not originating in himself and his actions, but subsisting independently. That being the case, the law (which is anxious to provide against the possibility of committing fraud, at the same time that it provides for the protection of right) removes the temptation to practice the former, by prohibiting every man from setting aside his own deliberate

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deliberate acts by *stultifying himself, although it [* 21.]
furnishes a means by which his heirs after his death, or
his friends whilst he is living, may avail themselves of
this disability. And it is to be observed, that the law
in these cases does not proceed upon the ground that
the party is bound; for that cannot be, seeing that,
by the law of nature, he wants the capacity to assent to
a contract; but, because the policy of the law, which
rather submits to a particular mischief than a public in-
convenience, sets bounds to the law of nature in point
of form and circumstance.

For similar reasons of public policy, all acts done by
idiots and lunatics in a court of record, as fines, re-
coveries, and the uses declared upon them, recogni-
zances, statutes, and the like, are good, and neither
they themselves, nor their heirs, nor executors, can
avoid them.

4 Rep. 224. 2.
And. 145. 193.
Co. Lit. 247.
2 Inst. 483.
Bro. tit. Fines 75
10 Rep. 42 b.
Bro. fait inrol.
14.

The law, in some instances, proceeds upon the
same principle with regard to infancy and dures; for
if an infant levy a fine, suffer a recovery, or enter into
a security of record, and omit to avoid them before he
come of age; or if a feme covert levy a fine; the
former cannot avoid such assurances and securities on
*the ground of infancy, nor the latter such fine on the [* 22.]
ground of dures.

But mark the reason of all these exceptions: it is
not because the law binds persons, who by defects or
disabilities are either by the law of nature or the law of
the land, disabled to contract, but directly the contrary;
it is, because the law finds them to be persons not so
disabled, and does not admit the averment of such
disablement, because, in the one case, it is certified
by the invincible and indisputable credit of the judge
(which is the highest evidence the law knows of) that
the *non compos*, or the infant is a perfect and able per-
son, and because, in the other case, the wife is exa-
mined of her free will judicially by an authentional
person, trusted by the law, and by the king's writ for
that purpose, and so taken in some sort as a sole woman.
And, therefore, the authority of the record is not to
be contested, nor is it to be avoided by any averment
against the truth of it: for that would tend to lessen
the credit of judgments in courts of record, by trying
them by other rules than themselves. So that the
same law of policy, which prohibits a person *non compos*
from stultifying himself upon grounds of public
convenience,

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[* 23.] * convenience, likewise, upon similar grounds, prohibits an infant, or feme covert, from taking advantage of infancy or coverture, when to permit such plea would be attended with public inconvenience.

Then, if the ground of general inconvenience be a sufficient reason in our law for admitting a mischief in particular, to prevent a public inconvenience, by holding not only such persons, but also their heirs and executors, to their contracts if of record, and refusing to admit all averments in such cases of these disabilities in *perpetuum*; surely there is nothing ridiculous in the common law having adopted the maxim, that a man should not avail himself during his life of his own folly or insanity; because the admission of such an allegation would, as we have mentioned, open a gate to dissimulation, deceit, and fraud.

*See before
by Guardian*

[* 24.] * civil law has done, without whose assent no act of theirs is binding, yet it has established a curator, who may protect and secure their lands and goods: and to that intent the common law has given the custody of idiots, madmen, and lunatics, and of all that they have to the king, who is bound of right, by law, to defend his subjects, their goods and chattels, lands and tenements; which prerogative is declared by the statute of the 17 E. 2. cap. 9 and 10 *de prerogativa regis*, which (as is expressly stated therein as to lunatics) also expressly enacts, that the king shall provide that their lands and tenements shall be safely kept, &c. "*So that they shall in no wise be aliened*" within the time aforesaid (i. e.) during the suspension of their understanding.

1 Chan. Ca.
353.

Jenk. Cent. 40.
Pl. 77. 4. Rep.
126. b.

Fitzh. Abr. tit.
Sci. fa. Pl. 10.
106. 1 Chan.
Ca. 112.

Upon these statutes it is holden, that, after office found upon the writs *de idiota inquirendo*, or *de lunatico inquirendo*, the alienation, gift, or other act, &c. of him who is *non compos mentis*, as well as of him who is an idiot, may be avoided, even during his life, in a *scire facias* by the king, who is bound as *pater patriæ* to protect all his subjects, their goods and estates; and which office, to prevent all incumbrances, shall have

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have relation to the * disability. For the reason why [* 25.] they cannot be avoided by himself on plea, &c. is not for default of right, but by reason of a personal incapacity to do the act, namely, to stultify himself by his plea. And the rule is not impeached by this process; because the idiot or lunatic is no party to the record, for the whole truth is found by the inquest.

And, after such office found, all gifts made by an 4 Rep. 126. b. idiot, lunatic, &c. of his goods and chattels, and all bonds made by him are *utterly* void; and if he be sued in any action upon any bond or writing that he has made, the king, by his writ (so long as the office stands in force) reciting the office, may send a *superse-deas* to the justices, where the suit is commenced.

Upon these common law proceedings, the interpo- 3 Atk. 170.
sition of the chancellor, to avoid the acts of idiots and 3 P. Will. 105.
lunatics, seems to have been founded. For his autho- 111. 2 P. Will.
rity in these cases does not originate in the extraordi- 118.
nary jurisdiction of the court, or in the authority of the chancellor or keeper, *qua such*; but it is by virtue of a peculiar jurisdiction of the great seal, granted under the royal sign manual upon every * demise of the crown to the then lord chancellor or lord keeper, authorizing them, respectively, to make grants and orders for the custody of lunatics and their estates, and to act therein as they shall think fit, and by virtue of the prerogative of the crown. [* 26.]

Upon this ground, bills brought to set aside con- 2 Vern. 414.
veyances, settlements, and assignments, made by idiots Att. Gen. vers.
and lunatics (though in other respects reasonable, and Parkhurst, 1
for the convenience of their families^a) have been re- Chan. Ca. 112.
tained; for such bills ought properly to be brought by 1 Eq. Ca.
the attorney general or committee, and the lunatic Abr. 279-5.
ought not to be a party; because, if they were con- 2 Ver. 412.
sidered as brought by the lunatic, and founded upon Att. Gen. vers.
the extraordinary jurisdiction of the chancellor over the Parkhurst,
conscience of the party contracting, as having taken 1 Chan. Ca.
an undue advantage of the other contracting party, the 112. et vid.
same objection would lie in chancery to his stultifying Ibid. 153, 154.
himself as lies at law to that plea. Accordingly it was 2 Vern. 412,
said by the lord chancellor and justice *Dodderidge*, that 678.
if a man who is *non compos mentis* aliens lands, they Vide 1 Eq. Ca.
shall not be restored to himself in chancery, upon a matter Abr. 278 Pl. 1.
of requity, against the maxim of the common law. 1 Roll. Ab.
And in 377. Pl. 11.
the

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[* 27.] the case of the attorney * general and Sir *Robert Parkhurst*, which was a bill filed to set aside an assignment made by a lunatic long before inquisition, but after the time he was found lunatic, it was objected that the lunatic was not made a party, and the objection was overruled, the reason for which was, that he might not stultify himself.

1 Chan. Ca.
113. S. L.
1 Chan. Ca. 153,
154.

But it seems that it is not a fatal objection to a bill for the purpose of avoiding an act of a lunatic, &c. that he is a party with the attorney general or his committee; the latter of whom seems, to some purposes, to be the representative of the crown, and to stand in the place of the attorney general, and not to represent the lunatic.

Ridler ver. Rid-
ler, 1 Eq. Ca.
Abr. 279-5.

Thus where a bill was brought by a lunatic and his committee to set aside a settlement, which had been obtained from him by the defendant, before the issuing out of the commission of lunacy, but subsequent to the time wherein, by the commission, he was found to have been a lunatic, the defendants demurred; for that it was a known maxim of law, *that a person should not be admitted to stultify himself*. The lord chancellor overruled the demurrer; and alledged, as one reason for so * doing, that the committee was likewise a plaintiff, and the several charges of lunacy were by him, in behalf of the lunatic: and his lordship said, that it had been always held that the defendant must answer in that case, and he was ordered to do so.

[* 28.]

But where a suit is on behalf of the lunatic, and in order to compel the performance of an agreement made with him before he became insane, and is not to set aside an agreement made by him, the lunatic ought to be a party; because he may recover his understanding, and then he is to have his estate at his own disposal, and his committee is but a bailiff with regard to him, and accountable to him or his representatives; in which respect his case differs from that of an idiot, for his recovery is not expected by the law.

Att Gen. verf.
Woolich, 1
Chan. Ca. 153.

Thus where a bill was brought by the attorney general, on behalf of a lunatic, to be relieved upon a marriage agreement for the benefit of the lunatic *before he was such*, and the defendant demurred, because the lunatic was no party; it was ruled a good demurrer: the lord keeper declaring, that it was as needful

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to make the lunatic a party as an infant, * where a [* 29.]
 suit was on his behalf; for, in such a case, his being a
 party does not tend to stultify himself.

If, in such cases, it be a question whether the ^{2 Vern. 412,}
 transactions impeached, as being done when the party ⁴¹⁴
 was *non compos*, were done when he was in a state of
 insanity or at a lucid interval or whether he had lu-
 cid intervals or not; the court of chancery will direct
 an issue to try those facts. But a person *non compos* at
 times only, may bind himself by an agreement made in
 his lucid intervals.

Drunkenness, though operating during its continu- per Sir Jos. Je-
 ance as a temporary insanity, yet being of a man's own kyl, in John-
 procuring, is not, in law, of itself a ground for a son v. Medli-
 man to rescind his assent to a contract or agreement, cott, 3 P. Will.
 whether the same respect his lands or goods, or other ^{231, note A.}
 thing concerning him. Nor is it a reason, in equity,
 for relieving a man against any contract or agreement,
 gained from him when in those circumstances.

Upon this principle Lord *Hardwicke* thought that, ^{Cory v. Cory,}
 where an agreement was to settle disputes in a family, ^{1 Vez. 19.}
 and was reasonable, the * objection that one of the
 parties was drunk at the time, was not sufficient [* 30.]
 ground to set it aside, unless some unfair advantage
 had been taken.

But if the party, from whom such contract or agree-
 ment has been gained, were drawn in to such a de-
 bauch by the management or contrivance of him who
 gained the contract or agreement, and was in such a
 state as to be utterly deprived of the use of his reason
 and understanding, then equity would relieve; for
 such an assent can by no means be esteemed serious or
 deliberate, and without this no contract can be binding
 in equity.

Nor is a person's being of a weak understanding of
 itself any objection, in law, to his binding himself by
 his assent to a contract; for neither courts of law nor
 equity examine into the wisdom or prudence of men
 in their manner of transacting their concerns, or dis-
 posing of their estates. If a man, therefore, be legally
compos mentis, be he wise or unwise, he is the disposer
 of his own property, and his will stands for a reason
 for his actions. And the rule is the same in equity;
 for if a weak man give a bond, and there be no fraud
^{Osmond v. Fitzroy, et al.}
 or 3. P. Will. 129.

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[* 31.] or breach * of trust in the obtaining it, equity will not set it aside only for the weakness of the obligor, if he be *compos mentis*; for the court of chancery will not measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity.

Osmond v. Fitzroy, et al. 3 P. Will. 129.

But if there be any fraud in procuring a bond from a weak man, or the transaction be attended with circumstances that warrant a suspicion that the party, binding himself, has been practised upon by imposition; then a court of equity will furnish relief. Therefore, where the parents of a young nobleman, had intrusted a servant to take care of an infant heir on his travels, and to prevent his being imposed upon; and the servant, continuing with him until he was twenty-seven years of age, had then prevailed upon him to enter into a bond to pay him a thousand pounds, which bond was prepared by the servant himself and kept a profound secret: Sir *Joseph Jekyl* relieved on the ground of fraud, and decreed the bond to be delivered up; saying, that the servant, instead of acting agreeable to his trust, had, himself, been guilty of imposition; and that a breach of trust was of itself evidence of fraud, nay of the greatest fraud; because a man, however careful otherwise, was apt to be off his guard, when dealing with one in whom he reposed a confidence.

[* 32.]

Upon the same principle, if a man were of a weak understanding, and were harrassed or rendered uneasy at the time of contracting; or if a deed were executed *in extremis*; or by a paralytic, whose mind could not be supposed to be adequate to the business he was about, and who might therefore be easily imposed upon; this might, if the provision in the deed were something extraordinary, or the conveyance made without any consideration, or one remarkably inadequate, be relieved in equity.

Cro. Car. 502.

Infancy.

An infant is under an incapacity to grant or convey, by deed, any part of his property; the case of a lunatic, and that of an infant, going, in general, as has been said, hand and hand in this respect; both being governed by the same reason, *viz.* want of power or capacity to assent to any alienation; therefore a grant, surrender, or conveyance made by an infant of his estate, by deed or matter in fact, is absolutely void; and although some have endeavoured to distinguish between

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tween a deed, * which gives only an authority to do a [* 33.]
 thing, and a deed which conveys an interest by the
 delivery of the deed itself, viz. that the first is void
 and the other voidable; yet the better opinion is, that
 the reason is the same to make them both void, unless
 it be in the case of a feoffment, which is only voidable
 because of the solemnity of the conveyance.

But conveyances by act of law, are void or not as
 against an infant, according to their effect; for the dis-
 ability of an infant (analogous to that of one *non com-
 pos*) to assent to an act *in pais*, is only *quo ad hoc*, and
ex parte: that is, it is only a disability to bind himself,
 and not such a disability in him as discharges others.
 The validity therefore of such acts depends upon,
 whether there be an apparent benefit, or the semblance
 of a benefit, to the infant. If neither of these appear
 upon the face of the transaction, it is merely void;
 otherwise voidable or not, at the election of the infant.
 And, therefore, although the surrender of an infant Cro. Car. 50a.
 lessee by deed is void, his surrender in law, by accept-
 ance of a new lease, will be void or not, according to
 the terms of such new lease. If it either increase his
 term, or decrease his rent, it will be good, but if
 * neither of these be effected by it, it will be void.

[* 34.]
 It is observable, that this incapacity of an infant is of
 a mixed nature, partly physical and partly moral, pro-
 ceeding frequently from the want of legal, not of na-
 tural, discretion; for, in deciding upon the contracts
 of infants, the actual state of their capacities, or their
 physical power to decide rationally, is not considered;
 it being sufficient that they want discretion in presump-
 tion of law, which every person does (without refer-
 ence to his actual ability or judgment) until he arrives
 at his age of twenty-one years; except in cases of
 actual necessity, in which cases, the disability to con-
 sent so as to bind *himself* (as far as it operates as a mo-
 ral incapacity) being intended as a privilege and to
 protect persons of tender years from imposition, yields
 in the degree, in which its influence would counteract
 its object.

Upon this principle an infant is bound, at law, by Cor. Jac. 494.
 his contract or bargain for diet, apparel, necessary
 learning, employment, and the like: and the court of 1 Term Rep. 41.
 King's bench were of opinion, in the case of *Freeman*
 and *Hurst*, that a promissory note, given by an infant

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[* 35.] for * board and lodging, and for teaching him the business of hair-dressing, was valid, and would support an action for the money.

15 Nov. R. 278

Vide Cro. Ja. 320.

Bro. tit. cover-
ture et enfant,

Pl. 25. Kirkton

v. Eliot. 2. Bulst.

69.

Fitzh. Nat.

Brev. quart.

edit. 390. 21 H.

6. 31. b. 9 H.

6. 10. Bro.

t.t. Labourers,

43, 51 tit. Co-

vert, 25.

So if an infant take a lease of an house or of land, and reside in the house, or enter upon the land and manure it until a rent day; if the rent be not of greater value than the lease, he will be liable to an action of debt for the rent.

And an infant of twelve years old may bind himself by a covenant to serve in husbandry; and if he depart from his service, an action will lie against him, founded on the statute of labourers, 23 E. 3. stat. 1.

So a single obligation, entered into by an infant, for a sum *actually* laid out in necessaries, will bind him.

Cro. Eliz. 920.

1 Lev. 87.

March 145.

1 Roll. Abr. 729.

Pl. 8.

3 Burr. 1719.

And an infant may, even at law, be bound by a presumed agreement; for it was said by *Yates*, Justice, that an action of assumpsit for a fine, due by an infant on an admittance to a copyhold, would lie, if the infant continued to occupy and enjoy.

[* 36.]

* But, at law, the legal capacity of an infant to bind himself by his assent to a contract, does not extend beyond the necessity that gives rise to it; namely, his education, necessaries, and lodging. Therefore if an infant be in trade, and incur a debt in buying things to maintain his trade, it will not bind him, although he gain his living thereby.

Whittingham
vers. Hill. Cro.
Ja. 494.

3 Salk. 196.

And the rule of law is the same, as to a debt incurred in repairing houses belonging to him, or the like.

Freeman v.
Hurst, 1 Term
Rep. 40. Bart-
lett v. Emery,
ibid. 42, (note
a.)

Neither can an infant bind himself by stating an account; because the only consideration for the promise that arises in law upon a stated account, is the stating of the account. Therefore, as an infant cannot state an account, the consideration does not hold, and the promise is void.

Farnham v.
Atkins, 1 Keb.
446.

So where a woman covenanteth to teach an infant to sing and to dance, and to find him in meat, drink, washing and lodging, and the infant covenanted to serve her: it was held that the infant was not bound by the covenant.

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* But an infant's bond, even for money borrowed, [* 37.] may, by circumstances *ex post facto*, become binding in equity.

Thus where an infant borrowed a sum of money for which he gave a bond, and then devised his personal estate (being of sufficient capacity) for the payment of his debts, particularly those he had set his hand to; this bond was decreed to be paid, notwithstanding the minority of the obligor. Hampson v. Lady Sydenham, Nelf. Chan. Rep. 55.

And although, at law, a contract entered into with an infant for money, even to pay for necessities, be void according to the resolution in *Salkeld*, yet it is otherwise in equity; for if one lend money to an infant to pay a debt for *necessaries*, and, in consequence thereof, the infant does pay the debt: although he be not liable at law, he will, notwithstanding, be so in equity; because in this case the lender of the money stands in the place of the person paid, *viz.* the creditor for necessities, and shall recover in equity as the other should have done at law. Salk. 279.

And although an infant cannot by his assent bind himself to a specific contract, except * in cases of the nature of those above stated, yet his incapacity does render contracts entered into with him, if there be any semblance of benefit to arise to him thereby, void, or voidable by the party contracting with him; for though the infant has this privilege, yet the party with whom he contracts has it not; for the latter knows with whom he contracts, and, therefore, shall not be relieved against his own folly; nor shall that be turned to the prejudice of the infant, which the law designed as a protection and security to him against all disadvantageous contracts. Note. This observation appears to be equally applicable to a contract with an idiot or madman. For, as to the other contracting party, the assent is perfect.

Therefore, where the plaintiff declared that the defendant (in consideration that the ^{plaintiff} defendant would suffer him to take away so much of the plaintiff's grafts which the defendant had cut down) promised to pay him so much for it; it was moved in arrest of judgment, after verdict, that the plaintiff was an infant, and, therefore, that he not being bound by the agreement, neither ought the defendant to be bound by it; for the consideration was not good, because not reciprocal; for the infant might have avoided his promise, if an action had been brought against him. *Sed non allocatur.* Smith v. Bowen, 1 Mod. 25. S. C. 1 Vent. 51. et vid. Farnham v. Atkins, 1 Sid. 446. Forester's case, 1 Sid. 41.

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[* 39.]
Holt v. Claren-
cieux, Strange
937.

* So it was held in the case of *Holt and Claren-
cieux*, wherein the plaintiff declared that it was mutually
agreed between her and the defendant, that they should
marry at a future day which was past; and that, in
consideration of each other's promises, each engaged
to the other; notwithstanding which the defendant did
not marry the plaintiff, but had married another,
which she laid to her damage of 4000*l*. The defen-
dant pleaded, that the plaintiff at the time of the pro-
mise was an infant. And it was contended, on the
behalf of the defendant, that the plaintiff not being
bound equally with the defendant, this was a *nudum
pactum*, and that therefore the defendant could not be
charged in the action. But the court were of opinion,
that as marriage was then looked upon to be an ad-
vantageous contract, the agreement was not void, but
voidable at the election of the infant; and that as to
the person of full age, it was absolutely binding.

And equity will decree a specific performance of an
agreement so circumstanced against the adult.

Clayton v. Ash-
down, 9 Vin.

[* 40.]
Ab. 393. Pl. 4.

Thus where A. during his minority, by himself and
guardian, entered into articles to let B. a farm at a
certain rent; B. entered upon * the farm and conti-
nued the possession, and paid the rent after A. came
of full age. Then A. conveyed the inheritance to C.
and afterwards B. quitted the farm, insisting that he
was only tenant at will, and refused to accept a lease
or execute a counterpart, because A. being an infant
at the time of making the agreement, was not bound
by it, and therefore B. ought not to be bound by it.
But by *Harcourt* Chan. B. shall execute a lease to C.
and C. execute a counterpart of such lease to him in
pursuance of the articles, and B. shall pay costs.

Cro. Car. 303,
306.

If an infant make a lease for years reserving rent,
and the lessee enter; he may make the lessee his tenant,
or, at his election, a disseisor, and proceed against him
accordingly.

And the court of Chancery, which in these cases
acts upon principles of substantial justice and natural
equity, on whom the custody of infants officially de-
volves, has frequently interposed, and held infants to
their contracts in cases where, at law, they would
not have been bound. The principle upon which
that court proceeds, seems to be this: that, as, on
the one hand, if advantageous contracts were not
binding

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* binding upon the persons contracting with infants, the protection which was intended as a privilege, would, in event, become a prejudice; so, on the other hand, if no agreements would bind infants either in law or in equity, that privilege, at the same time that it protected them from prejudice, would debar them from the possibility of reaping any advantage by contracts, as none would treat with those whom they knew could not be bound. Equity, therefore, considers the intrinsic nature of the contract, with what view it is entered into, who are the parties to it, whether the friends of the infant advise and consent to it, the extent of its influence, and in what degree it has been executed, and directs the conscience of the infant according as these circumstances affect the agreement; thereby giving to such transactions their just efficacy.

[* 41.]

Thus a contract made by an infant, by the advice and consent of his friends, has been decreed to be good, and that under the most harsh circumstances imaginable; namely, by turning the interest of money into principal, upon condition that the creditor would not, at that time, extend the lands of the debtor. As where J. S. mortgaged his estate to C, and then * died leaving D. his daughter and heir, who was an infant and had nothing to subsist on but the rents of the mortgaged estate. The mortgage having been suffered to run in arrear three years and a half, C. grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal. Upon which D.'s mother, with the privity of her nearest relations, stated the account, and D. being then near of age, signed it. This agreement was established by the court of Chancery, being for the infant's benefit, who, without it, would have been destitute of subsistence.

[* 42.]
Earl of Chester,
field v. Lady
Cromwell,
1 Eq. Ca. Abr.
287. 1.

From these considerations that head of equity, which, in cases of marriage contracts and agreements, authorizes the court to restrain infants (parties thereto) from rescinding, by decreeing such agreements to be binding on their property, seems to have sprung.

For it is obvious, on reflection, that marriage agreements for the settlement of the property of the parties are not original, but are in the nature of accessory contracts. The principal contract is the marriage itself, which male infants at fourteen, and female infants at twelve, are of capacity to enter into with consent

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[* 43.] * consent of their parents or guardians. As soon as the marriage is had, the principal contract is executed, and cannot be set aside, or rescinded even at law; so that it is then considered upon the same footing as contracts binding on the ground of necessity. The estate and capacities of the parties are immediately altered. The children born of the marriage are equally purchasers under both father and mother. So that were the parties permitted to rescind such contracts, the interest of third persons, the issue, would be affected; for such agreements must be either good or bad *in toto*, because every part constitutes the whole, as the consideration arises from each part; and, consequently, it is impossible to take away any part of the consideration, without overturning the agreement entirely.

Then, as the law has entrusted the parents and guardians of infants with the direction of the principal contract, the marriage of their children and wards, and considers the children, when acting under that sanction, as bound by their assent in like manner as in other contracts arising out of necessity; it seems perfectly consistent with the principles * of equity and justice, that they should be bound, acting under the same sanction, by their assent to the accessory contract respecting their property. And the interest of the issue in, and alteration in the capacities of the parties to such contracts, furnish an equitable ground for the interposition of the courts. And, indeed, if equity did not enforce such agreements, this privilege of not being generally bound to the execution of contracts, meant to protect infants, would militate in cases where the infant's fortune was in money the other way; for, the primary contract being binding, must be followed by its legal consequences, one of which would be, that the husband, money being a personal thing, would be entitled to the absolute property in it immediately upon the marriage.

Price v. Seys,
Barnard. 117,
S. L. per Lord
Hardw. 3 Atk.
613.

The first case that occurs of this kind is that of *Price and Seys*. There a lady, entitled to a portion of 3000 *l.* payable at her age of twenty-one, and likewise entitled to a bond of 100 *l.* both of which were made chargeable upon a real estate, entered into a treaty of marriage, the lady being at that time but eighteen years of age. Upon this occasion marriage articles were made,

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made, by which, in * consideration of the intended [* 45.] marriage, and of the 3000*l.* portion and of the 100*l.* bond, the intended husband agreed to make a settlement upon her, the uses of which should be to the husband and wife for their lives, and the life of the survivor of them, by way of jointure upon her, and in bar of her dower, the remainder to the heirs of the body of the wife by the husband begotten, &c. The marriage was solemnized, and then the husband died, without having made a settlement, the wife surviving. She afterwards married again, and then she and her husband set up a claim to these sums in her right as surviving her husband. On a bill filed between the parties in Chancery, the question came before Lord *Talbot*, who was of opinion, that there was no ground for the claim. His lordship said it was clear, that if, a settlement had been made in this case, instead of the articles, the court would not have suffered the wife to claim the benefit of the demands in question, notwithstanding she had survived her husband; for the husband would have been considered as a purchaser of her portion. That in this case there was no settlement made, but only articles. Then the question was, whether that would make any difference? And his * lordship's opinion was, that it would not. For it [* 46.] was reasonable that these articles should bar the wife of the benefit of these choses in action, in the same manner as a settlement itself would have done.

And it would make no difference, in such case, whether the interest of the wife were in possession, or depended upon a contingency. The case of *Theobald* Theobald v. Duffay, 9 Mod. 101. 1 P. Will. 574, 2 Eq. Ca. Abr. 88. c. 11. vide inf. and *Duffay*, determined finally in the house of Lords, is a very strong case to this purpose. So is the case of *Harvey* and *Ashley*, wherein an objection was made, that, as part of the fortune of the wife (who was an infant) was a contingent personal interest, which by the marriage would not have been transferred to the husband, the settlement of that could not be beneficial to the infant, and was therefore remediless: but Lord *Hardwicke* disallowed that distinction.

And in the case of *Blois* and *Lady Hereford*, this Blois v. Lady Hereford. 2 Vern. 501. principle was carried still further, an infant being there considered as bound, as to her personal estate, by her agreement, *inferred* from circumstances only. In that case A. married with B. who had an estate in land and a fortune

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[* 47.] a * fortune in money. Being both infants, an act of parliament was obtained for settling a jointure on the wife in bar of dower, but to cease if she did not settle her land when of age; but nothing was said as to the wife's personal estate, part of which was a mortgage for 1300*l.* taken in a trustee's name. The wife when she came of age settled her own land. Afterwards the husband died. The question was, whether this money should go to his executors, or survive to the wife as a chose in action? and Lord *Cowper* (then lord keeper) said, that he laid no stress upon the declaration of trust. *The law of the court would presume a promise*; and in all cases where a settlement was equivalent, it was to be intended that the husband should have the portion. The wife should not have her jointure and fortune both.

But these cases must be taken with some distinctions. For if, in such case, the jointure were inadequate to the wife's portion, much more if there were any collusion between the wife's friends and the husband in the making of the jointure, so as by that means it was not suitable to the lady's fortune; there, if the proportion consisted in choses in action, unaltered during the marriage, as she would be entitled * to her legal interest in these choses in action by surviving her husband, a court of equity would not, in such a case, take from her the benefit of them: and in that case she would have an equity, rebutting the equity which the representative of the husband would have upon her.

Vide 2 P. Will. 243. In the case of *Cannel and Buckle*, Lord *Macclesfield* said, that if a feme infant seized in fee should, on a marriage, with the consent of her guardians, covenant, in consideration of a settlement, to convey her inheritance to her husband, and it were done in consideration of a competent settlement, equity would execute the agreement.

5 Atk. 615. And although Lord *Hardwicke* observed, in the case of *Harvey and Ashley*, that this was going a great way, as it related to the inheritance of the wife; yet he admitted that there were cases where the court would go to that extent. For instance, if lands of the wife were no more than an adequate consideration for the settlement that the husband made, and after the marriage the wife should die and leave issue, who would be entitled to portions provided for them by the settlement,

Vide *infra*, Cecil v. Salisbury.
Bishop of Bath and Wells v. Hypley.

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ment, it would * in that case be very reasonable for the [* 49.] court to affirm that settlement.

But in the case of *Durnford and Lane*, which was a Durnford bill praying a specific execution of articles, made pre- v. Lane,
vious to the marriage of *Thomas Lane* with *Ann Bowyer*, 1 Brown's Ca.
then an infant, entered into for the settlement of her Chan. 116.

estates, by which it was covenanted that, upon her attaining her age of twenty-one, the husband and wife, and her mother, should levy fines, and settle the estate in trustees to the use of the mother for life, remainder to the trustees to pay the rents, &c. to the wife for her separate use during her coverture—remainder to the husband for life, remainder to the children of the marriage, in such proportions as the wife should appoint, in default of appointment, share and share alike in tail general—remainder to such uses as the wife should appoint; and in failure of appointment, part to the mother in fee; and whereby the husband covenanted to permit the wife to enjoy the estates to her separate use, and that he would lay out 500 l. and 1500 l. to certain uses declared by the settlement: Lord *Thurlow* seems to have been of opinion, that an infant would not be bound by articles made * previous to her marriage re- [* 50.] specting her real estate, unless she had a settlement from her husband, and had, after his death, taken possession and availed herself of it; in which case his lordship thought she would be bound by the equity arising from her own act. Upon which ground he declared, in this case, that he could not say the whole property of the wife was bound, or decree the articles to be specifically performed.

But it is observable, that, in the preceding case, the general object of the settlement was the *fortune* of the wife *only*, and that the court was able to give relief without actually deciding the question, as to the validity of such contract by an infant.

And Lord *Thurlow*, in the case of *Williams and Williams*, was of opinion, that a marriage contract, the effect of which was to preclude an infant from any thing, whether real or personal, which should come from any quarter, would be void, as unreasonable. Williams v. Williams.
1 Brown's Ca.
Chan. 153.

But, in such cases, the husband will be bound by his covenant, respecting the estate of his wife which shall

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[* 51.] shall afterwards come to * him, as well as respecting the estate of which she is in possession.

Williams v.
Williams.
1 Brown's Ca.
Chan. 152.

Thus where by indentures, previous to the marriage of A with B. an infant, it was agreed, that 700*l.* advanced by B. and 700*l.* advanced by her uncle, should be laid out in lands, which should be settled upon her for life, with remainder to trustees, upon trusts therein mentioned; with a proviso in the deed, by which A. covenanted, that all sums of money, &c. which should come to B. or to him, in her right, from the mother, or *otherwise*, should be applied to or vested in trustees to the same uses as the 1400*l.* A chose in action belonging to the wife, was reduced into possession by A. and a moiety of the residuary estate of the mother of B. devolved upon A. And Lord *Thurlow* held, that the husband having covenanted for himself, that what should come to him should be bound by the articles (which he might do) the chose in action must be so applied, and also the moiety of the residuary estate of the mother.

[* 52.] And a wife is also entitled to the interposition of the court of Chancery, to enforce an agreement made on her marriage with an * infant, if her portion be an adequate consideration for the settlement stipulated.

Strickland v.
Coker, 2 Chan.
Ca. 211.

Thus where the defendant was seised for lives of a church lease, in trust for an infant to whom he was guardian; and on a treaty of marriage between the infant and the plaintiff, who had 1000*l.* portion, an indenture was made, with the consent of the guardian, whereby the infant covenanted that the lease should be surrendered, and a new lease taken, in which the life of the intended wife should be put in for her jointure. The guardian was made party to the deed only to shew his consent; the marriage was had; the portion paid; the lease was surrendered, and the wife's life put in; the husband died. Then the widow sued the guardian to assign the lease to her for her life. And it was decreed that he should so assign; and the decree was affirmed on a rehearing.

Hollinghead v.
Hollinghead,
1 Strange 604.

So where a man devised his estate to A. for life, with several remainders over, with power to the person in possession to limit any part of the premises for a jointure, not exceeding one moiety; the first devisee for life, whilst an infant, married, and, with his mother,

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ther, *entered into articles to settle lands of 100*l.* per [* 53.]
annum on the wife for her jointure. But in the articles
 no notice was taken of the power. Before any jointure
 made pursuant to the power, the tenant for life died.
 And on a bill against the remainder-man to have the
 jointure made good, it was so decreed.

A woman, being an infant, may also, by an agree- *Drury v. Drury.*
 ment entered into on her marriage, waive her right of *5 Brown's Par.*
 dower and thirds incident by law to the act of marriage. *Ca. 570.*

This seems a necessary consequence of the principle
 established by the house of Lords in the case of *Drury*
 and *Drury*, in which it was decided, that a woman
 being an infant, might, under the statute 27 *Henry 8th*,
 by contract to accept a jointure, preclude herself from
 her right to claim dower, or thirds, in her husband's
 real or personal estate. Upon which decision, courts
 of equity, following up the principle, have founded a
 variety of cases, wherein, by provision of the husband,
 a wife may be barred of dower, where the common
 law would not bar her: as on an establishment in the
 nature of a jointure settled out of * personal estate, if [* 54.]
 so framed as to import a jointure, whether expressed or
 no. This the court does by way of enforcing the
 agreement of the parties, and to prevent double satis-
 faction. Thus a bond given before marriage for the
 wife's livelihood and maintenance, was held a satis- *Vizard v.*
 faction for dower, though the word Jointure was not *Longdale,*
 used. *1 Vez. 55.*

But, if an agreement with an infant be without sem-
 blance of benefit to him, it will in *all cases* be void.

Therefore a bond with a penalty, although given *1 Roll Abr.*
 for necessities received, will not bind him; for it *729. Pl. 8. Mo.*
 never can be for his advantage to enter into a penalty. *679. Godb. 219.*
 That this is the principle upon which such a bond is *Ca. 316.*
 void, is clear from the circumstance, that, if an infant
 and a surety enter into a penal bond for necessities for
 the latter, the bond will bind the surety, although it
 will not bind the infant. So that it is not the nature of
 the bond, but the incapacity of the infant, that makes
 it void.

And where agreements have been held to be in them-
 selves

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[* 55.] 'selves void against infants; they * have, nevertheless, been considered as made binding by their subsequent assent when of full age.

And it is not necessary that the assent, in such cases, should be express, it seems sufficient that acts be done, from whence an assent must necessarily be inferred.

Vide Franklin
v. Thornbury,
1 Vern. 132.
Vide infra.

Thus an agreement, void in itself as against an infant, was nevertheless held binding; the infant having received interest under it, after he came of full age. Which resolution is founded on this reason, that the law will never intend a wrong in an act that can, by any construction, be made lawful.

2 Vern. 225.
1 Eq. Ca. Abr.
282. 3. Vide
Darnford v.
Lane, supra.

So if an infant make an exchange of lands, and continue in possession after he come of age, he shall be bound by it.

2 Vez. 526.

Lord *Hardwicke* was of opinion, that the equity would be the same, suppose a woman, being an infant, and entitled to a small real estate of inheritance, were to marry; and the husband, in consideration of that real estate, and that he should have and enjoy the inheritance for his own benefit, settled a * provision by way of jointure on her, whether of land or personal estate is immaterial, and then he died; and she, after his death, took to that provision so made for her, and enjoyed it, and afterwards died: for, putting that case in argument, he says, the court of Chancery would not, in such case, suffer her heir at law to insist on the inheritance of that real estate by descent from her; but would hold her heir at law bound by her subsequent agreement, she having thereby bound herself by her own acts, and departed from her interest in that real estate. And the court would decree her heir at law to be a trustee for the heir at law of her husband.

3 Atk. 617.

And such implied assent may be either permanent or temporary. Therefore if a woman marry, and a jointure is made after marriage, and the husband die leaving her an infant; if she, without doing any act to determine her election, marry a second husband during her infancy, and he enter on the jointure estate, that entry will bind the husband and wife during the coverture.

And in some cases a mere acquiescence, after the infant's

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infant's attaining his age, furnishes * a sufficient reason [* 57.] for a court of equity to hold an infant to his agreement; for if a man does not express his desire to be relieved; when he has convenient means, it is to be presumed that he is willing to abide by his original agreement; especially if those with whom the contract is made, be prejudiced thereby.

Thus where a bill was filed for the execution of the trusts of a will, and to compel a sale, in order to raise portions and maintenances for younger children; and the heir, being a minor, in his answer desired the trust estate might not be sold, and offered to subject other lands, not within the trust, for the better raising of the portions, so that then a sale would not be necessary: the court of Chancery held the heir to his offer; because, by that means, he had delayed a sale. And the court said, that if he would have departed from what he had offered, he ought immediately, when he came of age, to have applied to the court, to have retracted his offer, and amended his answer, which he had neglected to do.

Cecil v. Salisbury.
2 Vern. 224.
1 Eq. Ca. Abr. 282. 4.

And where, on submission, an award was made between the bishop of Bath and Wells on the * one part, [* 58.] and an infant and his guardian on the other part, that, during the bishop's life and the infant's minority, they should both be at liberty promiscuously to dig lead ore, &c. and that the profits should be divided equally between them; Lord Nottingham, on a bill brought to confirm the award, being of opinion that the infant was bound by it, indemnified the trustees for what they had done, and decreed, according to the prayer of the bill, that the award should be established.

Bishop of Bath and Wells v. Hyppley, cited
3 Atk. 614.

But there must be some equitable ground for the interposition of the court of Chancery, or it will leave such agreements to their fate at law. Therefore if an infant sell land for money, and then re-invest the money raised by the sale in the purchase of other land; this sale will not be aided in Chancery, because the person of the infant is *disabled* by a maxim in law.

1 Roll. Abr. 376-5. 1 Eq. Ca. Abr. 282. 1.

And there are cases in which an infant shall be bound by his assent, even *at law*. Thus if he take an estate upon condition, he will, if he retain the estate, be bound by the condition, nor can a court of equity relieve him; for it cannot change the nature of infant's estates,

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[* 59.] * estates, nor make that absolute which is defeasible.

Pigott v. Ruffel,
Cro. Eliz. 124.

So if lessee for life, and he in the reversion, join in a fine to a stranger, and the reversioner reverses the fine for nonage, yet he shall not enter for the forfeiture; because he joined in the fine and consented to it.

1 Chan. Ca. 256.

1 Eq. Ca. Abr.

283. 7. Cro.

Eliz. 719.

Again, if an infant executor assent at seventeen to a legacy, such assent shall be good, if there are sufficient assets besides to pay debts, otherwise not.

1 Bac. Abr. 68.

Salk. 387.

Harris v. Lee,

1 P. Will. 483.

A feme covert is also, during the marriage, incapable of binding herself or her husband by her assent to any agreement *in pais*, she being, in consideration of law, under the coercion and dominion of her husband, and, consequently, having no moral capacity to assent to a contract either respecting his property or her own.

Coverture

[* 60.]

A feme covert, therefore, cannot, at common law, borrow money, nor contract a debt to bind her husband by borrowing money, even though such money be afterwards applied to buy necessaries for which she may * bind him; because still it was in her power to have wasted that money. But if money be applied to the use of the wife for her cure from any distemper, or for necessaries, the person who lent her the money, will, in equity, stand in the place of the persons who found and provided such necessaries for the wife; and as such persons would be creditors of the husband, so shall the lender stand in their place, and be a creditor also.

But there are many exceptions out of this rule of the common law; for a wife may have separate property, as to any contract respecting which she has in equity, the same capacity of assenting as if she were sole; therefore where a wife, authorized by settlement to dispose of her separate property, sells part of it, a court of equity will bind her, as a person equally competent with a feme sole.

And, in such cases, it is not necessary that her trustees be parties to the conveyance or consulted, unless their consent is made essential by the settlement; for the mere appointment of trustees is not sufficient ground from whence to infer, that such was the intention of the instrument creating the trust for her,

since,

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since * there must be trustees, or otherwise she could [* 61.]
have no separate property.

Thus where, on the marriage of A. and B. an estate was settled in trustees to receive the rents and profits for her sole and separate use, and as she should direct or appoint whether sole or covert. The wife, by deed of appointment, sold part to C. The husband covenanted against incumbrances. The trustees were not consulted. And, on a bill filed in Chancery to have the effect of this bargain, Lord *Hardwicke* decreed in favour of the purchaser, saying, that it was impossible not to decree to the purchaser of this equity and trust the benefit thereof as against the wife, so far as purchased from her, and as against the husband, so far as he had bound himself by his own contract: for the rule of the court was, that when any thing was settled to the wife's separate use, she was considered as a feme sole, and might appoint in what manner she pleased, and, unless the joining of her trustees was made essential, there was no occasion for it. Grigby v. Cox.
1 Vez. 517.

But it is always more prudent for the purchasers of such interests to talk with the trustees; as their approbation will induce courts * of equity to view such transactions, which are generally contrary to the intent of the provision, with a more favourable eye.

[* 62.]

And an acquiescence by a feme covert in a court of equity, to any disposition of her separate estate, will operate as a virtual appointment.

Thus where a feme covert, having power to receive the profits of an estate to her separate use, and appoint them as she pleased, brought a bill jointly with her husband for an account, and submitted that the profits should be applied to the payment of her husband's debts, for which a decree passed; she was held to be bound by this acquiescence, and the bill, to which she was made a party *without collusion*, was considered in equity as an execution of her power, in like manner as an actual appointment would have been. Allen v. Popham,
1 Vez. 163.

And any engagement made by a feme covert, respecting the disposition of her separate property in this or that way, may be enforced in equity against her, although her husband be out of the reach of the process of the court.

Thus

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[* 63.]
Bell v. Hyde,
Pre. Chan. 328.
Gill Rep. Eq.
 83.

* Thus where a woman, previous to her marriage, had her own fortune settled upon her; and, her husband being very much in debt, and arrested, and the creditors going on to take out execution, and seize his goods, she, to prevent it, gave a note, that if they would discharge the action, (which was for 2000*l.*) she would pay the debt out of her own separate estate, and the action was accordingly discharged. A bill, brought against her and her husband on her refusing to make good this agreement, was retained by Lord Keeper *Harcourt*, after advising with Sir *John Trevor*, master of the Rolls, and an attachment against her in the absence of her husband, was held to be regular.

So the general engagement of a wife will, in equity, operate upon her separate personal property, and apply to the rents and profits of her real estate; and her trustees will be obliged to apply both, when they arise, to the satisfaction of such general engagement.

Peacock v.
Monk, 2 *Vez.*
 193.

Thus Lord *Hardwicke* said, in the case of *Peacock* and *Monk*, that, if a wife, having an estate to her separate use, borrowed money which she gave a bond to pay, this would give a foundation to demand the money * against her out of her separate estate, she being considered as a feme sole as to that.

[* 64.]
Norton v. Tur-
vill, 2 *P. Will.*
 144.

So, in the case of *Norton* and *Turvill*, where a feme covert, before her marriage, with the consent of her then intended husband, conveyed an estate to her separate use, and after her marriage borrowed 25*l.* upon her bond and died. Though it was admitted that the bond given by the feme covert was absolutely void, and in that respect differed from a bond given by an infant, which was only voidable, yet it was held to be payable out of the separate estate of the wife, which was a trust estate for payment of debts.

Stanford v.
Marshall, 2 *Atk.*
 68.

So, in the case of *Stanford* and *Marshall*, the rents and profits of the separate estate of two femes covert were ordered to be paid by their trustees to creditors by bonds, in which they had joined with their husbands.

And an agreement, made by a feme covert with her husband respecting this property, will be binding, and will operate in the nature of an appointment.

Thus

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Thus where E. devised hereditaments in * several [* 65.] counties to trustees during the life of M. his daughter, wife of Sir C. M. in trust, to pay the rents and profits during her life, *to such persons as she should appoint, for her separate use, and with which her husband should not intermeddle*, nor should the same be liable to his debts: and also directed, that his executrix should, within six months after his decease, out of his personal estate, pay to his said trustees, or the survivor of them, 6,000 *l.* upon trust to place the same out at interest with his daughter's approbation, for such purposes as she alone, by any writing executed in the presence of two or more witnesses, or any writing purporting to be her will, notwithstanding her coverture, should direct, so as the same should be for her own separate use, and not to be liable to her husband's debts or disposal, and devised other estates to the same uses, and died. And then, by articles between Sir C. M. and M. his wife, she, in consideration of his consent to her desire of living separate, agreed that he should have paid to him out of her separate effects 1000 *l.* within three calendar months then next following, with 200 *l.* *per annum*, parliamentary taxes deducted, for his life, payable quarterly. And it was thereby stipulated, that the agreement should be made * an order of court, and that the trustees should consent thereto, and that, until such consent and order could be had, the agent for M. and her trustee should give security by a bond of 1000 *l.* penalty, conditioned, that either M. should perform the articles on her part, and that such order of court and consent should be had, or, that M. should be delivered up again into the possession of her husband. And Sir C. M. covenanted that, on being paid the 1000 *l.* and such consent and order being obtained, M. should live separate from him without molestation, and that he would give security for his performance of the articles. By an indorsement on these articles, made subsequent, the same were affirmed, and a proposal made for exchanging the 1000 *l.* for an additional annuity of 100 *l.* *per annum* to the husband for life. On a suit brought after the death of M. for a performance of these articles, it was decreed, that the articles were well executed by M. pursuant to the power vested in her by the will of E. her father, and that the same should be performed and carried into execution, as far as they remained unperformed by her and her trustees; which decree was afterwards affirmed, with costs, on an appeal to the house of Lords.

Freeman et al.
v. Sir Cleve
Mason, 2 Eq.
Ca. Abr. 26. Pl.
29. Bunb. 205.
3 Brown's Par.
Ca. 378.

[* 66.]

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[* 67.] * And a covenant in articles, entered into before marriage, that a wife shall have the disposition of such real and personal property as she shall acquire during the coverture, is such an agreement as a court of equity will support, and render valid as to any equitable estate that shall accrue to the wife during the coverture. And any disposition thereof made by her, although it be without a fine, will be effectual to bar her heirs.

Wright v. Lord
Cadogan, et al.
6 Brown's Par.
Ca. 156.

Thus where an indenture was executed previous to the marriage of A. with B., reciting that B. was then entitled to a copyhold estate of inheritance and a rent-charge therein mentioned, and that she had great expectations of a considerable accession of fortune from several relations; and that A. not being in the actual possession of any estate out of which any provision might be made for her, it had been agreed between them, that the said copyhold lands and the said rent-charge, should continue and be to the sole and separate use of B. notwithstanding her intended coverture, and free from the controul or intermeddling of her intended husband, and not to be subject to his debts; and that all such estates, either real or personal, or of any kind whatsoever, * which should or might descend upon or come to her during her coverture, or to her husband in her right by descent, or by virtue of any remainder or reversion, or of any devise, gift, or bequest, or by virtue of the statute of distributions, or by any other means whatsoever, should likewise be and enure to the said B. for her sole and separate use, free from the controul of the said A. and no ways subject to his debts, and to be applied and disposed of, from time to time, as she should, by any deed or deeds, executed in her life-time, or by her last will and testament duly made and published in the presence of three or more credible witnesses, direct or appoint, notwithstanding her coverture; it was therefore witnessed that, in consideration of the said marriage, and for better establishing and confirming the said agreement, the said A. covenanted with C. and D. that he would, as soon as conveniently might be, at the request of the said C. D. and B. execute and perfect all such deeds, acts, matters, and things, conveyances and assurances, as should be devised or advised by her counsel, for better and more effectually securing the said copyhold estate and rent-charge for her sole and separate use, notwithstanding her coverture; and from time to time, as often

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* as any estate, real or personal, should descend upon [* 69.]
 or come to the said B. or the said A. in her right, by
 descent, devise, bequest, or gift, or by virtue of any
 reversion or remainder then limited, or afterwards to
 be limited, or by virtue of the statute of distributions,
 or by any other means whatsoever, would execute and
 perfect such deeds, acts, conveyances, and assurances
 in manner aforesaid, for vesting the same in such per-
 son or persons as she should appoint in trust for her
 sole and separate use, and to be subject to such dispo-
 sition as the said B. should from time to time, and all
 times thereafter make thereof, by any deed or deeds,
 writing or writings, under her hand and seal, or by
 her last will and testament, duly made and published
 in the presence of three or more credible witnesses;
 and that, until the said B. should convey and assign the
 premises in manner abovementioned, it should be law-
 ful for the said C. and D. and the survivor of them,
 or his executors, administrators, and assigns, to re-
 ceive the rents and profits of the said copyhold lands,
 and the said yearly rent-charge, and also the rents and
 profits of all such lands as might or should descend
 upon or come to the said B. as abovementioned, dur-
 ing the intended coverture; and also all * such per- [* 70.]
 sonal estate as aforesaid, and pay the same to her, or
 as she should appoint, for her separate use, and subject
 to the like disposition of the said B. notwithstanding
 her coverture.

At the time of executing this deed, B. was entitled *Ibid.*
 to the reversion in fee of several estates vested in trust-
 ees, subject to an estate for life of W. S. and a limita-
 tion to his first and other sons in tail.

B. being thus entitled, duly executed in the presence *Ibid.*
 of three witnesses her last will and testament, or deed
 of appointment, in the nature of her last will and tes-
 tament; and, thereby, after reciting her marriage-
 articles, she, by virtue of the power thereby reserved
 to her, and of all other powers enabling her in that be-
 half, did limit, appoint, give, and devise all her estate,
 &c. as therein mentioned. And the question was,
 whether the articles executed on B.'s marriage, and her
 subsequent appointment, was a good and valid appoint-
 ment of her estate, as against her heir at law.

It was contended, on behalf of the heir at law, that *Ibid.*
 the proper and only methods of enabling a *feme covert*

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- [* 71.] to dispose of her * inheritance by deed or will, or writing in nature of a will, operating as an appointment, were, either by a conveyance to uses or trusts before the marriage, reserving such power, or else by fine, in which she and her husband joined after the marriage, with a deed to lead the uses of it, reserving such power, to her over the inheritance vested in the conusees. But that, unless one of these methods was taken, her will of real estate would be void as an instrument or conveyance, and could not bind her heirs. That, in the present case, the power rested only upon articles between husband and wife, without any estate vested in trustees, out of which an appointment, by virtue of the power, was to enure. That B. might have appointed her estate as against the husband and his heirs, to whomsoever she thought fit, the articles being made for valuable consideration, as against the husband and those claiming under him: but that, as between her own heir at law and the devisees, it was a question merely between volunteers, and consequently they could claim no aid in equity to supply a defect in the capacity of the testatrix, as a married woman, to make her will, when such will must take effect as an appointment in execution of the power, or not at all;
- [* 72.] and the * power, in this case, remained only in covenant between her and her husband, without depending upon any estate vested in other persons, out of which it could take effect. On the other side it was contended, that the legal estate in the hereditaments devised was then outstanding in trustees, and therefore no formal conveyance of it was by any means necessary, as such conveyance could not affect the legal estate, or have any legal operation; it could amount only to a direction to the trustees to become trustees thereof for such persons, intents, and purposes, as she should by deed or will appoint. And as B.'s interest was only equitable, the general agreement and intention of the parties, clearly and indubitably expressed in the articles, were equally as strong and binding as an equitable conveyance; and did, in effect, amount to a direction to the trustees and their heirs, to stand seised of the reversion in trust, and for the benefit of such person and persons as she should appoint, and in the mean time for her separate use, exclusive of her intended husband; and especially as he, by the articles, covenanted to do all necessary acts, to enable his wife to make any such disposition or appointment of her reversion as she should think

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think fit, either by deed * or will; by which covenant [* 73.] he was bound, in equity, to do all necessary acts for authenticating and establishing of any deed or will which she should make concerning the same. And upon these grounds Lord *Northington* decreed in favor of the devisees and support of the appointment. Which decree was affirmed on an appeal to the house of Lords.

And the law is now held to the same, in respect to separate property so circumstanced, in which a feme covert has a legal estate; this was so determined in the case of *Rippon and Hawdin*. There a woman was entitled to a legal estate in lands, and her husband, previous to his marriage with her, gave bond to trustees, conditioned that she should have power, by will to dispose of her estate. She accordingly did so. And Lord *Camden* decreed the heir to be a trustee for the devisee, observing that this case was not to be distinguished from the case of *Wright and Cadogan*. *Sed quare*.

Rippon v. Hawdin, in Chan.

And a *feme covert* may, by acts done after the coverture is determined, render an agreement respecting herself, made whilst she was under coverture, binding upon her property * by relation; because acts done after the becoming a widow will bind.

[* 74.]

Thus where a provision was made by Sir *Edward Moseley* for his lady, in lieu of her jointure, by articles during her coverture, and she, after the death of her husband, entered only on forty-six pounds *per annum*, part thereof; she was held to performance of the whole articles.

Sir Edward Moseley's case, cited 2 Vernon 225.

So, where a mortgage, in the form of a lease, had been granted of a feme covert's estate by the husband and wife, and, after the husband's death, the deed being in the hands of the mortgagee, the wife had directed the tenants in possession to attorn to the mortgagee, had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for a number of years; the court of King's Bench were unanimously of opinion, that the conveyance in this case, though in the form of a lease, was in substance a mortgage; and not being within the reason for which leases by a feme covert were held to be only voidable, was absolutely void on the death of the husband; but that the acts done by the widow, the

Goodright, lessee of *Carter*, v. *Strathan*, Dougl. Rep. 53. note 17. S. C. Cowper 201.

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[* 75.] the deed being in * the possession of the mortgagee, were tantamount to a re-delivery, which, without a re-execution, was equivalent to a new grant.

And there are several cases in which a feme covert may, even at law, contract, and thereby entitle herself to or become the subject of an action, without her husband being joined, and as a feme sole.

1 Bac. Abr. 308.
1 Roll. Rep. 400.
Jenk. Cent. 4.
1 Com. Dig. 18.

Thus if a husband has abjured the realm, or is banished, he is thereby *civiliter mortuus*. And he being disabled to sue or be sued in right of his wife, she is in such case, considered as a feme sole; for it would be unreasonable that she should be remediless on her part; and equally so on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her.

And a wife, being considered in such cases as a widow, is suable on her general contracts.

Moor 851.
10 E. 3. Pl. 37.
[* 76.]
fol. 399. Co.
Litt. 332. b.
1 H. 4. 1.

Thus King Edward the Third brought a *quare impedit* against the lady of Maltravers, to which she pleaded that she was covert of * baron; whereunto it was replied for the king, that her husband was put into exile; and thereupon she was ruled to answer. So King Henry the Fourth brought a writ of right of ward against Sibyl Belknap, who pleaded that she was covert baron, to which a like reply was made by the king. And Gascoigne, C. J. *ex assensu sociorum*, awarded that she should answer.

So it is said in Moore's Rep. fol. 666. Ca. 910, that after a divorce a *thoro et mensa*, the wife may sue alone without her baron.

Countess of
Portland v.
Podgers,
2 Vern. 104.
Vide Co. Litt.
133. a.

So it was held, in the case of the Countess of Portland and Podgers, that where the husband was, by act of parliament, banished for life, the wife might in all things act as a feme sole, and as if her husband were dead; and that the necessity of the case required that she should have such power.

Vide Co. Bank.
Law 26. 1 Bac.
Abr. 308.

And, in the case of Sparrow and Caruthers, Mr. Justice Yates thought transportation, although but for seven years, to be such an absence of the husband, within the reason of the cases of abjuration, &c. as that the wife might, during that period, be sued alone.

And

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* And Lord *Holt* was of opinion, in the case of [* 77.]
Darley and the *Duchess of Mazarine*, that if a woman ^{1 Salk. 116.}
 married an alien enemy, she would be chargeable as a ^{1 L. Raym. 147.}
 feme sole for her debts and contracts, as much as if
 her husband had abjured or been banished.

So, by the custom of *London*, if a feme trades by ^{10 Mod. 6.}
 herself in a trade with which her husband does not in-
 termeddle, she may sue and be sued as a feme sole.

Of late years some other cases likewise have been
 considered, even at law, as exceptions out of the ge-
 neral rule, that a feme covert is under an incapacity
 of entering into a general engagement to bind herself
 or her property; upon the ground of there being cases
 begotten by the practice of modern times, which are
 not within the spirit, although they are within the
 letter of the rule. The instances alluded to are those,
 wherein it has been held, that a feme covert, living
 as feme sole on a *separate maintenance*, allowed her by
 her husband on a separation after marriage, shall not
 be permitted, if she gain credit in that character, to
 plead her coverture, in order, thereby, to prevent her
 creditor from recovering his debt.

* The first case of this kind was that of *Ringstead* [* 78.]
 and Lady *Lanesborough*, which was an action brought ^{Ringstead v.}
 by the plaintiff against the defendant for goods sold by ^{Lanesborough,}
 him to her. The defendant pleaded, that at the time ^{Hil. 23 Geo. 3.}
 of the promise she was *covert baron* of Lord *Lanesborough*, ^{B. R. Vide}
 a peer of *Ireland*, who was since dead. To this plea ^{Coke's Bank.}
 the plaintiff replied, that the defendant lived separate ^{Law 24.}
 from her husband, they having been parted before the
 promise made, and that she, by a deed of separation,
 had a large separate allowance, which was duly paid.
 And that the defendant lived in *England* and her hus-
 band in *Ireland*. To which replication there was a
 demurrer. Lord *Mansfield* delivered the judgment of
 the court in favour of the plaintiff, *but expressly declared,*
that his opinion was founded on all the circumstances of the
case taken together, and would only be an authority in a
case circumstanced exactly similar to the present. The
 circumstances were, that the wife lived separate from
 the husband, and had a separate maintenance, he *being*
in Ireland, she in England; that she acted as a feme
 sole, and it was a fraud in her to attempt to avoid
 her contracts by this defence; that this agreement,
 though between husband and wife, bound each of them

as

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[* 79.] as * effectually as if they were single. That the wife, under this agreement, had a property of her own; that she was under no power even of her husband; that the reason of her incapacity ceased; the creditor could not sue the husband; that when she contracted, she did it as a single woman; that after having got credit as a feme sole, she never should be permitted to say, that she was married; and more particularly when the consequence was not to make another person liable, but to prevent the creditor recovering his debt at all. That there was no case precisely in point, and therefore the court must make a new precedent, from reason, conveniency, and analogy to the authorities.

In the last-mentioned case, the husband's being *resident abroad* was relied upon as a *strong* circumstance, forming an analogy between that case and the cases which had gone before of persons exiled, abjuring the kingdom, transported, or the like. But the following case takes a broader ground, it having been therein held, that *where the husband is not himself liable to his wife's debts*, his being within the kingdom will make no variation. Therefore, where an action was brought for * goods sold and delivered to the defendant, and she pleaded coverture: it was replied, that the defendant lived separate and apart from her husband; that she had a competent separate maintenance regularly paid; and that the goods, mentioned in the declaration, were furnished for her separate use and support. There was a demurrer to the replication, and judgment for the plaintiff. The court observing, that though stress was laid upon the husband's being abroad in *Lady Lanesborough's* case, yet that made no difference, for that the principle of the judgment in that case was, "*that the husband was not liable.*"

The two foregoing cases, it is observable, arose upon actions brought to recover the *price of necessaries* purchased by femes covert, who were separated from their husbands, and, on their separation, furnished, by agreement, with the *means* of maintaining themselves.

But the doctrine of the capacity of a feme covert, so circumstanced, to bind herself, at common law, by her assent to contracts, has been in a later case, carried still further; to an extent indeed, which, if it can be supported upon principles of law, will leave her, as to her

Barwell v.

[* 80.]

Brooks, Hil.

24. G. 3. B. R.

Co. Bank. Law.

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* her moral capacity of *contracting*, in *all* respects in [* 81.] the same state, as if she were a feme sole.

The case alluded to is that of *Corbett* against *Poelnitz*, *Corbett v. Poelnitz*, Term

That *Ann*, before her marriage with Baron *Poelnitz*, Rep. vol. i. 5. was the wife of Lord *Percy*. That, after their marriage, a separation took place by mutual agreement, and

Ann had a competent maintenance of 1600 *l.* per annum as *Rutton* where it was held that a feme sole cannot contract & be sued as feme sole, even tho' she has living apart from her husband, having a separate maintenance secured to her by deed.

settled on her by deed. That then *Ann* (whilst she was so covert with Baron, and whilst she lived so separate and apart from him, and whilst her maintenance was duly secured and paid to her) in consideration that *Corbett*, the plaintiff, at the special instance and request of *Ann*, and for and in consideration of the sum of 900 *l.* paid by *Chambers* to *Ann*, had then and there become held and firmly bound, together with *Ann*, to *Chambers*, by their joint and several bond in 1800 *l.* conditioned for the payment of an annuity of 150 *l.* during the natural life of *Ann*; and had also, at the like special instance and request of *Ann*, together with her, executed a warrant of attorney for confessing judgment on the bond for * 1800 *l.* and costs of suit, at the suit of *Chambers*, undertook and promised faithfully to indemnify *Corbett* against the said bond, and warrant of attorney. That afterwards, and after this promise, the marriage between *Ann* and Lord *Percy* was dissolved by act of parliament, by which the same provision of 1600 *l.* was continued and secured to her for life. That afterwards, *Ann* was married to Baron *Poelnitz*. That after this marriage, 262 *l.* 10 *s.* became payable to *Chambers*, by virtue of the condition of the bond for one year and three quarters annuity, whereupon judgment was entered up on the bond for the 1800 *l.* and 63 *s.* costs; and thereupon *Corbett*, to prevent his being taken in execution, had paid the 262 *l.* 10 *s.* and 5 *l.* 19 *s.* costs; yet, that Baron *Poelnitz* and *Ann* had not paid him the same, or indemnified him against the payment thereof. A verdict being given for the plaintiff, a motion was made in arrest of judgment, upon the ground, that, although in modern times the law allowed a woman to have a separate maintenance, yet that was only an exception to the general rule; and extended no further, than to enable the wife to provide herself with necessaries; that this fund, being given for necessary maintenance, therefore

[* 82.]

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[* 83.] * therefore was only liable for necessities; that although the court had gone so far, as to say, *when a wife agreed to receive a separate maintenance, she should be answerable for such maintenance*; yet that did not prove that she was so much a *feme sole*, as to be able to make or bind herself by every species of contract. The court gave their opinions separately on the question. Lord *Mansfield* said, that the facts laid in a very narrow compass, and admitted of no doubt. Lord and Lady *Percy*, by a deed, mutually agree to live separate; neither can break this agreement; and a large maintenance is settled on her for her own private separate use, as a *feme sole* to all purposes, the same as if she were unmarried. The claim upon which this action is founded, is of a most meritorious nature. Lady *Percy* applied to the plaintiff; he considered her as a *feme sole*, and became surety for her: she promised to indemnify him; and the contract was concluded, under a firm belief on both sides, that it was perfectly valid and binding. In justice, then, she ought to pay this debt. But then, to encounter this, there is a rule of positive law, which is to be adhered to and preferred, though in some particular cases it

[* 84.] may seem * productive of hardship and oppression. By this general rule, a married woman can have no property, real or personal. Her contracts are entirely and universally void; for her contracts, even for necessities, are the contracts of her husband: she cannot be sued, or taken in execution. This is the general rule. But then, it has been properly said, *that as the times alter, new customs and new manners arise*: these occasion exceptions, and justice and convenience require different applications of these exceptions, within the principle of the general rule. The question then is, whether it is so here? whether, under the circumstances of the present case, a married woman should, or should not, be sued solely? exceptions have been made in this very case. Where a husband is in exile, or has abjured the realm, and credit has been given to the wife alone, *justice says she must pay, for the husband cannot be sued*. So it is in the case of transportation, though the case is not exactly the same; for, there, the absence is only temporary, because the husband may come over, and be sued afterwards. Why, then, is it so established? because the wife acts as a single woman, gains credit as such, receives the benefit, and shall

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shall be liable * to the loss: *and where she has an estate to her separate use, in justice she ought to be liable TO THE EXTENT OF IT.* In modern days, a new mode of proceeding has been introduced, and deeds have been allowed, under which a married woman assumes the appearance of a *feme sole*, and is to all intents and purposes capacitated to act as such. In the ancient law, there was *no idea* of a separate maintenance; but when it was established, what said the courts? *that the husband shall not be liable even for necessities*; and they said so, because convenience and justice required it. In the present case, no distinction has been taken at the bar, whether supposing Lady *Percy* to be liable, her second husband is so; and they have done right, for so he must certainly be. The only question then is, whether a woman married, but living separate from her husband by agreement, having a large separate maintenance settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, shall be sued as a *feme sole*? I think she should; it is just that she should be so. I am of opinion, that the present case is determined by the two late ones which have been cited (*viz. Ringstead and Lady * Lanesborough, and Barwell and Brooks*) which do not rest upon one or two circumstances as contended, but upon the great principle which the court has laid down, "that where a woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such." There is the same justice in this case, nor can I see any difference between them. *Willes, Justice, concurred.*

Alhurst, Justice. It seems to me, that to decide the present question, we need only consider the *reasons* on which the incapacities of a *feme covert* are founded; not on the same ground as those of an infant, whose disabilities arise from a want of discretion; but first, because she has no property; and secondly, because it would be unreasonable to permit the wife to affect the property of her husband, except where he will not allow her necessities; in which case her contracts are the contracts of her husband. Now, where a woman has a separate maintenance, and the husband cannot be charged, it follows *naturally that she must*; and if so, we cannot draw a *precise* line, and say, she shall be liable for this, and not for that; for her incapacity, arising

[* 85.]

[* 86.]

Vide supra Lady Lanesborough's case, said by Lord Mansfield to be only an authority in a case circumstanced exactly similar to itself.

Quere of this principle, vide infra.

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[* 87.] arising from want of property, * being once removed, she is, in my opinion, suable for all. But if, as was supposed, she were only liable in respect of her separate maintenance, she could not be liable generally, but only so long as the maintenance continued, after the manner of an executor, as long as assets remain in his hands. That, however, cannot be: if she exhaust her whole fund, it is her own folly, but does not render her less liable. As to her being only liable in respect of her first settlement, such a doctrine was never before contended. If she be liable at all, she is liable generally, and that not only for necessities, but for all contracts. I think the other two cases govern this, and that the rule for arresting judgment must be discharged; for she gained a general capacity to contract debts, and consequently her second husband takes them; for he takes her *cum onere*.

Vide supra in this case, contra per Lord Mansfield.

Vide contra inf.

Buller, Justice. The only considerable distinction to be found between this case and that of *Ringstead* and *Lady Laneborough*, is the non-residence of Lord *Laneborough*: but that is entirely done away by what the court said in *Barwell* and *Brooks*, that it made no sort of difference whether the * husband was in *England* or not, for he was not liable; which was the great principle that influenced the decision, and not his local situation. Hence, then, we have only to consider, whether it is possible to draw the line, that the wife shall only be liable for necessities. The opinion of the two judges in *Hatchett* and *Boddeley* went wide of it, and it has never been much pressed: but I think the objection has no force, for if she has a power of contracting, it must be a general one. A distinction has been made as to the fund that is liable; and it has been asked, what if she alien the whole? the argument, however, stops short; for it ought to have shewn, that the husband would again become liable in that case: but there is no colour to say, that, if the wife spends the whole of her settlement, her husband shall be liable even for necessities. As to the *prudence* of the measure, that is no ground on which the court can found their decision. In *Lady Laneborough's* case, the only question was, whether she could acquire a capacity to contract? it was determined she could; and, therefore, as I think that case must govern the present, I am of opinion that the plaintiff may recover.

I have

[* 88.]

Vide this case infra, where De Grey C. Just. and Blackstone, are clearly of opinion, that a feme covert cannot bind herself by her acts under seal.

Quære, whether this be a true principle.

Quære, de hoc, vide supra.

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* I have stated the arguments of the court in the above case at length; because, if the decision which was founded upon them can be supported, it establishes a principle, upon the foundation of which a feme covert may, at law, execute instruments, give bond, confess a judgment, enter into contracts under seal by way of covenant or otherwise, and act, to all intents and purposes, as a single woman. For the action here brought, proceeds upon the ground that *Corbett*, the surety, has paid the money on account of the principal, and has thereby discharged the principal from the debt; upon which the law raises an implied contract, whereby the principal is supposed to have bound himself to indemnify the security. The consideration, then, upon which this implied contract is raised, is the discharge of the principal. But the principal cannot be said to be discharged from that, to which she never was liable; consequently, if this decision be law, it must be on the ground that Lady *Percy* was bound: the necessary inference from which will be, that a woman, so circumstanced, may bind herself at common law by bond. And if she can bind herself at law by bond, so may she likewise by any other instrument under seal.

* But it has been again and again adjudged, that a bond given by a feme covert, is, at common law, *ipso facto*, void, and shall neither bind her nor her husband. Then, as the implied contract, upon which the action brought by the surety is founded, rests on the surety's having discharged the express contract, and as a void contract cannot be discharged; there being no discharge, there is, in this case, no consideration to support the assumpsit; but it must resemble the case of forbearance given to an infant upon his bond, which has been decided to be no consideration to support an assumpsit, the infant not being liable to pay at the time of the forbearance.

But it is said, although it be true that it is a rule of positive law, that a married woman can have no property real or personal, and that, therefore, her contracts are entirely and universally void; yet, that modern times have introduced new customs and manners, and that deeds have been allowed, under which married women assume the appearance of femes sole, and are to all intents and purposes capable to act as such.

The

[* 89.]

[* 90.]
 Vide Norton v.
 Turvill, 2 P.
 Will. 144. S. C.
 supra, 1 Bac.
 Abr. 695.

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[* 91.] The term *modern times* is a relative term, * so vague in its nature, that one is at a loss to affix to it any certain idea. It is true that the common law had no notion of distinct interests between husband and wife, over which she could have a general disposing power; and it is no less true, that the notion of a *separate maintenance* has been recognized in equity from very early periods; for courts of that description have universally interposed in controuling and overlooking the application of this species of property, and making decrees respecting it for more than a century. But *Perkins*, whose writings were composed and published so early as the reign of *Edward* the 6th, expressly lays it down, *that, if there be a difference betwixt the husband and wife, by reason whereof certain LANDS of the HUSBAND are ASSIGNED unto the wife by the friends of the husband and by his assent, and the wife grant a rent-charge to be issuing out of the same lands unto a stranger, the grant is VOID.*

1 Chan. Rep.
44, 164. Finch's
Rep. 56, 73.

Perk. 4. sec. 8.

It is true, that it is only in very late times, that courts of law have supported actions against married women, unless in instances where they have been considered as under a civil widowhood; which differed from the case of a separate maintenance, in as much as this was a separation *by act of law*, and, * therefore, a woman, so circumstanced, was entitled to her dower or jointure, and was, in consideration of law, to all intents and purposes, a single woman; whereas the rights of the husband of a woman having a separate maintenance, to *all* other-intents and purposes, *except* as to the disposition of that maintenance, remain as they were previous to such a settlement. He is entitled to any property she acquires by gift. He may release a legacy bequeathed to her. He will be entitled to the rents and profits of a real estate descending upon her. She remains under the same incapacity of disposing of her real estate, nor can she contract as to any part of her personal estate, not comprized within her separate maintenance.

Wayland's case,
3 Bulst. 188.

[* 92.]

It is also alledged, "that as, where a woman has a separate maintenance, the husband cannot be charged, it follows naturally that she must." If the reason why a feme covert is not suable for contracts entered into by her, were, that her husband is so chargeable, the contrary proposition might be fairly inferred, where the husband is not so. But as the principles upon which a feme covert's incapacity is founded, are quite of another nature,

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nature, stating * the true principles will evince the weakness of such an argument. [* 93.]

The disability of a feme covert to contract, arises from three circumstances: First, For want of POWER to assent so as to bind *herself*, she having, in *consideration of law*, no will of her own, her will being, by the marriage, subject to that of her husband. Secondly, For want of power to bind her husband. Thirdly, For want of property.

By the common law a wife is disabled to make any grant, contract, or bargain, without the authority, allowance, and consent of her husband. And if a feme covert make a contract in the market, or elsewhere, even for bread to maintain the family, and it be found *expressly* to have been made *without the allowance or consent of her husband*, the contract is void, and shall not charge him, even although it be expended in the household of the husband. But if the wife, cohabiting with the husband, has a general licence from him to buy necessaries, her contracting (without being particularly authorized as to the time) for necessaries for herself, her husband, her children, or her family, is evidence to a jury to find the assent * of the husband, unless the contrary be expressly shewn; because it cannot be reasonably presumed, that any man would deny his assent to have the necessities of his family supplied. It is true that a wife ought to be maintained, and it is the more necessary that it should be so provided by our law, as it takes away all property from her, by which she might provide for her own subsistence; therefore, if her husband turn her out of doors, the law implies that he gives her credit for common necessaries, and to that extent considers her contracts as his. But in neither of these cases is her right to be maintained, founded either on a right she has to contract for herself, or on a power the law gives her to charge her husband by way of contract, but there must in both cases be his assent, either express or implied. The contract must be *his*, and not her contract. And therefore it is that, upon her departure from him, she cannot bind him, even by her contract, for common necessaries; for, from the moment of her separating herself, all evidence of the consent of her husband to maintain her ceases, and the obligation so to do is also at an end.

But

Old Nat. Brev.
62. 21 H. 7. 40.
b. Pl. 64. Bro.
Abr. tit. Con-
tract 19. 1 Roll.
Abr. 351. (E)
Pl. 5. 20 H. 6.
22. 1 Mod.
Rep. 126. Fitz.
Nat. Brev. 277.

[* 94.]

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[* 95.] But if the proposition put by the court in * the Baroness *Poelnitz's* case were true; viz. "that when the obligation in the husband to maintain ceases, the capacity of the wife to contract begins," a wife, on her departure from her husband, would instantaneously be bound by any contracts she should make. But the law is otherwise; for, though the act of departure destroys the evidence of the husband's consent to her having necessaries, because it would be unreasonable to bind him by an implicit consent to keep two houses; it does not dissolve the marriage, or restore to the wife the power of volition, which, from the time of the intermarriage, the law, that looks upon the husband and wife as one person, and, therefore, allows but one will between them, which it considers as placed in the husband as the fittest and ablest to provide for and govern the family, deprives her of. And when it is considered, that the law gives to the husband the absolute power over her personal property, and the government and direction of her real property during the coverture, it is but reasonable that, as her departure does not restore her power over those, neither should it subject her to her contracts, which, without her property, she must be incapable to discharge. Many cases might

[* 96.]

¹ Salk. 118.

² Roll Abr.
350. E. 1. 8.

Ibid, E. 4.

Strange 375.

² Blackst. 1079.

X

Ex gratia, if a woman, residing with her husband, take up goods, as silks or muslins, and pawn them before they are made into cloaths, the husband is not bound to pay for them, because they never came to his use. Yet no man will say that the wife is therefore liable. So if a woman borrow money, and cloath herself in a better manner than her rank requires, although this comes to the use of the husband, because the wife must of necessity be clothed, yet the cloaths being beyond her estate, her husband shall not be chargeable with the money. And if a wife buy any thing, the husband shall not be bound to pay for it, unless it come to the use of the husband. And yet in neither of these cases shall the wife be liable. And Lord Chief Justice *Raymond* held, in the case of *Child* and *Hardiman*, that if a woman elope from her husband, though she does not go away with an adulterer, or in an adulterous manner, a tradesman trusts her at his peril, and the husband is not bound.

Lord Chief Justice *De Grey*, in the case of *Hatch*

and

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and *Baddely*, lays down the law in * these forcible terms. "No act of the wife can ever make her liable to be sued alone. If she can be sued, *she can sue*, acquire property, release actions, *execute deeds*, &c. WHICH WOULD OVERTURN FIRST PRINCIPLES." And *Blackstone*, J. said, "that it seemed to be supposed by the argument, that if the husband was not bound to pay this debt, it followed that the wife might be compelled alone. *But this was no legal consequence.* He thought, in the then present case, IT COULD NOT BE RECOVERED OF EITHER. And he was clearly of opinion, that in no case could any *feme covert* be sued alone, except in the known excepted cases of *abjuration, exile, and the like*; where the husband was considered as *dead*, and the woman as a *widow*, or else as divorced *a vinculo*. And therefore *Elizabeth Wil-* Co. Litt. 133; Moore 851.
mot, whose husband was abroad when she attempted to sue alone, did it with the addition of *Widow*. The contrary doctrine militated *against the FIRST PRINCIPLES* of the *English* law, which considered the woman's powers, nay almost her very being, as suspended during the *coverture*. Her contract was merely void so as to bind herself, said all the judges in *Manley* 1 Sid. 120.
 and *Scot*. She and her husband might plead *non est factum* to her * bond: If judgment were had against [* 98.] her, or she were outlawed, her husband and she might reverse it by writ of error. The very forms of the 144.
 action demonstrated the same thing, if sued alone she could have no addition, which was in the very teeth 173.
 of 1. Hen. 5. c. 5. If sued in her maiden name, it was a misnomer: If by her husband's name, and as a widow, it was the like: She could not put in bail without her husband. And as the previous steps were thus embarrassed, so after judgment the remedy must prove defective. No *elegit* could go against her lands; otherwise this would be a mode of alienation by a *feme covert* without a fine. It would be endless to pursue this idea through all its legal ABSURDITIES. 6 Mod. 311. Cro. Ja. 445.

It will hardly be contended; after what has been observed, that the principle, upon which a married woman is discharged from her contract, stands upon the ground, *that her husband is bound by her contract*. And if that be not the principle, the conclusion founded upon it, "that if the husband be discharged, the wife must be bound," will be equally fallacious.

E

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[* 99.] * But it is said, that the circumstance of a *separate maintenance* being provided for the wife alters the case. In a degree it does so, even at law: and *that* consistently with first principles and former adjudications. It has been stated, that the true ground upon which a husband, who turns his wife out of doors, is liable to be sued for necessities purchased by her, is, that the law, which takes from her the capacity of contracting herself, in its humanity, concludes, that in such case, her husband consents that she shall contract for him to this extent, and the fact of the expulsion is evidence of this consent. But, if the husband provide a separate maintenance, the presumption that he intended to give her credit on his account for necessities fails, the positive provision rebutting any such conclusion upon him. In such cases, then, the property may be made liable to this purpose, without any deviation from the rule, as to a *feme covert's* capacity to contract, by considering the separate property, as answerable, by the assent of the husband, for the wife's maintenance. This mode of considering the case seems warranted by the forms of proceeding, for it is necessary, in all such cases, that the husband should

[* 100.] * be a co-defendant. "And if he be not a party to the record, the whole proceeding will be vitious. There is no instance in the books, of an action's being sustained against the wife, the husband being living, at home, and under no civil disability. *A wife, by a VOLUNTARY separation, does not acquire such a character, which may be called a civil widowhood, nor is taken notice of by the law as such.*"

Per Curiam
unan. in Lean
vers. Schutz.
2 Blackst. Rép.
1195.

Supra.

Vide 3 East.
188.

Vide Newsome
v. Bower.
3 P. WH. 37.

This, then, seems to be the only ground upon which the case of *Barwell* and *Brooks* can be supported, and not the assumed principle, "that the husband was not liable, and that, therefore, the wife was."

The analogy assumed between these cases, and the cases where the husband is exiled, or has abjured the realm, or the like, is equally fallacious; because those cases are founded upon the *civil* death of the husband; for that amounts to an actual *dissolution* of the marriage; entitles the wife to her dower, or jointure, &c. and, consequently, restores her to her original capacity of *taking property in her own right*, and of binding herself by *her own assent*, without reference to her husband.

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* But it is said, "that it is impossible to draw the line, that the wife shall be only liable for necessaries." [* 101.] This is begging the question. That she may be considered as liable, in law, to the extent of her separate maintenance *only*, is clear. That she ought to be charged no further, in equity, will be evident; if we advert to the principle upon which this property is liable to her contracts, and to her situation in relation to her husband and the public. The true principle as has been shewn is, that her husband *assents* to this property being liable to her maintenance, and that; therefore, her contracts entered into for that end attach upon it. Then, in the relative situation in which she and her husband still stand, she can acquire no other property. If estates descend to her, or personalty be distributed to her, the husband's claim is not barred. She cannot dispose of the one; or levy a fine of the other, without his consent. If her property be limited, so ought her capacity of rendering herself liable to be limited. Then, as to the public, they are in no worse a situation, than if they give credit to a woman who elopes. It is a risk the law imposes on those who give credit to women. If it be an inconvenience, it must be remedied * by the legislature who makes, not by courts whose *province* is, by the constitution, confined merely to the exposition of them. [* 102.]

But the common law recognizes, and admits a distinction between the separate maintenance and general property of a feme covert: for *per Holt*, if husband and wife be divorced *a mensa et thoro*, and a legacy be left to the wife, and the husband release it, she is thereby barred; and the law is the same as to an obligation made to her before marriage, for the marriage continues, and the husband hath all her right; but if, in such case, the wife has *her alimony*, and sue for defamation or other injury, and recover costs, and the husband release them, this shall not bar the wife; for these costs come *in lieu* of what she has spent out of her alimony, which is a *separate maintenance*, and not in the power of her husband.

And courts of equity assist creditors no further, than to make the separate maintenance liable to the satisfaction of their debts. Kinge v. De-
vall, 2 Vern.
326.

Thus where Sir R. A. and his lady, by reason of some discontents in the family, agreed to live apart,

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[* 103.] and there was a *separate* * maintenance settled upon the lady, but determinable upon either of their deaths. The lady contracted several debts during the separation. Sir R. died. A bill was then brought to subject the defendant's jointure to the payment of the plaintiff's debt. *Ex per* lord keeper, Had the separate maintenance continued; there might be some reason for the creditors to allow *that*, and make it liable to their satisfaction; but that being determined by the death of the husband, he did not see which way the jointure could be charged with it.

But it is said, that, in equity, a woman having a separate estate may be sued as a feme sole. Then why should a fair creditor be sent there to seek redress? the answer is obvious, the subject matter to be affected falls under the proper jurisdiction of a court of equity, whereas, with relation to the wife, *the law does not recognize it*. It being a principle of law, that no division of property can subsist between husband and wife, they being as one person, it follows, that no contract between them can be binding, except by the intervention of a trustee; therefore every separate estate of a feme covert, of whatever * nature it be, must be a trust estate, and as such cognizable in equity only. Upon this principle alone, such an estate was held in the case of *Norton and Turvill* not to be within the statute of limitations, so as to be protected in equity by that statute from the demands of a creditor, whose debt had been contracted at the distance of ten years.

Vide *supra*.

[* 104.]
“ But, even in a court of equity, there is no instance of a personal decree against a feme covert for payment of a sum of money. If a feme covert, so circumstanced, have contracted that this, or that portion of her separate estate shall be disposed of in this or that way, she and her trustees may be decreed to make that disposition; but if she enter into an engagement, which would make a feme sole liable to the whole extent of her contract, as to her person, &c. in every respect, *it is clear such general engagement would not bind her as such*. The utmost extent of determined cases is, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents
and

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and profits of real estate, when they * arise, to the satisfaction of such general engagement." The law was thus laid down by Lord *Thurlow*, in the case of *Hulme* against *Tenant* and his wife, wherein Lord *Thurlow* took the distinction between proceeding *personally* against the feme covert, and carrying into effect the general engagement of a wife upon her personal property, and the rents and profits of her real estates, by obliging her trustees to apply them as they arose, to the satisfaction of such general engagement; his lordship refusing to decree a feme covert to execute a power of appointment over her separate estate, in order thereby to satisfy a bond entered into by her; and observing, "that although the remedy in equity was *more extensive* than in a court of law, yet he did not find that a court had ever ordered a power to be executed. They had industriously stooped short of so doing, and had only given a remedy by stopping the fund, where the power was executed." And his lordship refused to decree the feme covert to execute her power, although he was extremely clear, that the wife's leasehold would be liable to her contract.

[* 105.]
Hulme v. Tenant, et ux.
Brown's Ca.
Chan. vol. i. 16.

Now, if it be true, that the proper jurisdiction over property of this kind belongs to * a court of equity, it may be questionable, whether that court would, in any case, interpose to give effect to a general engagement of a wife who had a separate maintenance, to part with that maintenance, whatever they might do in case of an *actual* mortgage or assignment of it. There seems to be a material distinction between separate property retained by, or limited to a feme covert, and a separate maintenance allotted to her. The object, in the former case, is to enable a woman, though under coverture, to exercise the same power in the disposition of her estate, as if she were single. The object, in the latter case, is to enable a woman to live separate from her husband: therefore the same principle, *viz.* "to execute the intent of parties," that would induce a court of equity to support a fair agreement for a purchase of an equity or trust in the former case, would be an inducement for it to refuse its assistance in the latter case. The intent then, being clearly, that a feme so circumstanced should receive the separate maintenance from time to time, and not that she should have any power of disposing thereof; it seems, therefore, very questionable, whether the surety, in the

[* 106.]

case

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[* 107.] case of *Corbet* and * *Poelnitz*, would, even in equity, have had any relief against the Baronefs; for that must have depended upon whether that court would have deemed the original contract, such a one as it ought to establish and carry into execution; for if the court would not have established it in favour of the obligee, by decreeing him a satisfaction of the bond out of the trust estate, there would have been no consideration to support an equity to charge the fund in favour of the surety, whose only claim must be to stand in the place of the obligee, and to have the relief that he would otherwise have been entitled to. Lord *Hardwicke*, in the case of *Grigby* and *Cox*, said, that he should have had great difficulty in carrying the agreement in that case into execution, or establishing that purchase; because, *that sort of transaction was generally contrary to the intent*; for, where a feme covert was to receive rents and profits to her separate use, the friends of the wife meant not that she should make a sale of it, but receive it from time to time. This reasoning would apply much more strongly in the case of a separate maintenance; in which case the object of the settlement is, expressly, that of a continuing maintenance, which a sale totally defeats.

Wide supra.

[* 108.] * But if the contract between the Baronefs *Poelnitz* and *Chambers* had been of such a nature as a court of equity would have supported, the proper mode for the surety would, in my opinion, have been to have applied to a court of equity: for then, *Corbett's* having discharged her from a suit in equity by *Chambers*, by paying the money, might have been considered as a good consideration whereon to found a decree against her, that the surety should stand in the place of the principal, and be indemnified, what he had paid, out of her separate maintenance. And, when a court of equity furnishes ample relief, there seems no reason why a court of law should extend its power, by overthrowing both the soundest principles and clearest precedents, merely because the parties have mistaken the remedy.

An agreement entered into by a feme covert, jointly with her husband, for the benefit of her estate, will bind her: as if baron and feme bind themselves in the penalty of one hundred pounds, to pay one hundred marks to W. S. for a release from him of all his right in the lands of the wife. If W. S. release, and then

44 E 3. 33.
Bro. tit. Oblig.
74. et vide
Rothwell v.
Widington,
3 Vern. 456.

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the husband die, the wife * shall be bound notwithstanding her coverture; *because the release was for her advantage.*

[* 109.]

At common law, an husband, likewise, is under a moral incapacity of entering into any agreement with his wife, they being considered as *both* constituting but one individual person; whereas there must be two persons capable of reciprocally assenting to constitute a contract.

But, in equity, a man may, as between himself and his wife, make an agreement or declaration of trust, which, though not for valuable consideration, will take effect as against him, and any claiming voluntarily and in representation under him.

Vide Att. Gen.
v. Whorewood,
1 Vez. 538, 539.
Augier v. Augier, infra.
Ward, v. Bowyer, Finch's Rep. 56.

Thus, where a husband agreed that his wife should take two guineas of every tenant that renewed a lease with the husband, beyond the fine which the husband received; this was allowed to be the wife's separate money.

Calmady v. Calmady, cited 3 P. Will. 339.

And if a feme covert lend her husband money, saved out of an allowance arising * from an agreement between herself and her husband; the court of Chancery will consider her as a creditor against him, and his representatives, to that amount.

[* 110.]

Thus, where it was proved that the husband allowed his wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from his farm, over and besides what was used in the family, for her own separate use, and by way of pin-money; and it was proved in the cause, that when any one came to buy fowls, &c. he would say he had nothing to do with those things, they were his wife's; and that he also had confessed, he had been obliged to borrow a hundred pounds of his wife, to make up a sum to compleat a purchase: it was decreed that the wife, after the death of the husband, was well entitled to claim this 100 l. as a creditor: the Lord Chancellor observing, that courts of equity had taken notice of and allowed feme coverts to have separate interests by their husband's agreements, and that this 100 l. being the wife's savings, it seemed but reasonable encouragement to her frugality to allow it her; especially as there were no creditors to contend with.

Stanning v. Style, 3 P. Will. 335.

And

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[* 111.]
Gorges v. Chan-
cery, cited 1 Ca.
Ch. 118.

* And the wife may, in such case, dispose of her savings by will. Thus, in the case of *Gorges and Chancery*, where baron and feme by agreement separated and lived apart, and stipulated that the wife should have 150*l.* per ann. separate maintenance, out of which she saved some money, and put it out to interest, and took bonds in a friend's name for it, and disposed of the money by will: it was, upon debate, established to be a good disposition for a valid consideration.

2 *Vez. 539.*

And such agreement will also take effect against the husband's executors and administrators, and all claiming voluntarily or in representation under him. Thus, in a case before Sir *Joseph Jekyl*, relating to lady *Cowper's* estate, several gifts, made to her by Lord *Cowper* in his life, were established to belong to his lady, and to pass by her will.

Beard v. Nut-
hall, 1 Vern.
427.

So where A. after marriage, entered into a voluntary bond to settle a jointure of a given value on his wife, and died, after which the jointress was evicted: the court of Chancery, on a bill filed by the wife, decreed her to retain so much of the husband's personal estate against his representatives, as would * make up the deficiency in her jointure, notwithstanding the bond was given after marriage, and voluntary.

[* 112.]
Ross v. Ross,
1 Ca. Chan.
371.

Tenant in tail, agreeing that others shall enjoy his tail lands, will be bound thereby; and Chancery will, in execution thereof, decree him to levy a fine, and settle the lands accordingly.

A cestuique trust of an estate may, by his assent to an agreement to which the trustees are no parties, bind them and his interest therein.

Lord Cornbury
v. Middleton,
1 Chan. Ca. 173.
208.

Thus where A. seised of the King's moiety of the New River water in fee, conveyed the same to trustees, upon trust for himself and his wife during their respective lives, and afterwards upon trust that they should, out of the rents and profits thereof, pay his debts and portions for his daughters at certain days, and then to permit B. the heir of A. and his heirs, to take and receive the rents and profits. A. and his wife died; and then B. contracted with C. for sale of part of the shares of the said moiety for 7000*l.* part to be paid immediately,

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mediately, and the rest at a future time. * Afterwards [* 113.] S. contracted with B. by articles under hand and seal, for the whole moiety; and then B. and his wife, and the only acting trustee, executed a conveyance to C. according to the articles. Afterwards C. filed a bill to have the articles carried into execution; and notice of the articles entered into with C. being proved on S. it was then insisted for the latter, that there was no ground to decree the agreement made with C. it being made by a cestuique trust of the surplus only, and the trustees no parties, but, on the contrary, one of them swearing that he disapproved of the contract, and would never consent to it. *Et per curiam*, C. had the first agreement, and S. the second, and equity ought to decree with the first; for an interest in a trust is in equity assignable; and he that may transfer, may covenant that his trustees shall do it.

But it had been otherwise, if all the trustees had joined in a conveyance to S. without notice.

// Having, in the foregoing part of this chapter, submitted to the reader the observations that have occurred to me on the right which is vested in individuals to bind themselves, by their assent to any contract or * agreement, so as to render themselves responsible in law, or in equity for its performance, I shall next call the attention of the reader to the consideration of who are persons capable of contracting, and binding, both themselves and others, by their assent to contracts and agreements. *who are bound others as well as themselves by their assent*

[* 114.]

Churchwardens are a corporation, and, as such, are morally competent to assent to a reasonable contract or agreement beneficial for the parish; and, thereby, to bind the parishioners and their successors, and also succeeding churchwardens.

Thus, an agreement made by the churchwardens of a parish, that the five o'clock bell in the morning should not be rung; in consideration whereof the parties, inconvenienced thereby, covenanted with the churchwardens to erect a new cupola and bell; was specifically decreed and enforced by an injunction, not to ring the bell during the lives of the parties who had erected the cupola, &c. pursuant to the agreement.

The heir of a copyholder, whose father purchases a manor *Greenwood v. Hare, 1 Ch. Rep. 144.*

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[* 115.] manor for lives, will be decreed * to carry into execution an agreement made by the father to surrender and assign the same for a valuable consideration, if the father die before that be done.

Baden v. Countess of Pembroke, et al.
2 Vern. 213.

So an ancestor, seised in fee, may by his agreement bind his heir. Therefore if A. agree to sell lands, and receive part of the purchase money, and before any conveyance made, die; his heir, on a bill brought against him, will be decreed to convey, and the money will go to the executors; especially if there be more debts due, than the owner's personal estate is sufficient to pay.

Per Lord Hardwick, Prc. Ch.
640.

And the rule, in equity, is the same, where the estate is in borough *English*; there the youngest son will be decreed to convey as customary heir.

And a court of equity will, even when the ancestor is only tenant for life, decree a specific performance of an agreement made by him against the heir; where that agreement, at the same time of its being entered into, was clearly advantageous to the heir.

Chetwynd v.

[* 116.]
Fleetwood, et al. 4 Brown.
Parl. Ca. 435.

Thus where A. seised of lands worth 1300*l.* a year, subject to a mortgage of * 5000*l.* previous to his marriage, viz. in 1714, settled them on himself for life, remainder, as to part, for securing a jointure of 400*l.* a year to his wife, with remainder, as to other part, to trustees, for a term of years, to raise 2000*l.* for younger children, remainder in strict settlement, remainder to his own right heirs. And afterwards, not having issue, in order to secure his estate to his niece B. C. and her issue, and having occasion for 1000*l.* in May 1725, came to an agreement with C. her husband, that C. should pay the mortgagee 274*l.* 19*s.* for interest on the 5000*l.* and also the growing interest thereof, and indemnify A. against the same, and also pay him 1000*l.* (all which sums were to be repaid with interest) and should also pay 5000*l.* as A. by deed or will should direct. In consideration whereof, A. agreed to settle and convey, charged as above-mentioned, and, in pursuance thereof, did, by indenture of lease and release, bearing date the 1st and 2d of June 1725, convey and assure his estates to C. and W. deceased, and their heirs, to the use of A. for life, remainder, as to part, subject to the jointure of 400*l.* per ann. and to the terms for raising the younger children's fortunes, and the estate tail, limited by the deed
of

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of 1714 to trustees, for * the term of 500 years from [* 117.]
the death of A. to raise thereby 5000*l.* to be applied
as A. should, by will or deed appoint; and also to
raise all monies that A. should pay in discharge of the
mortgage or interest thereon; and, from and after the
determination of this term, to the use of C. and B. his
wife, father and mother of W. C. for their lives, re-
mainder to their children as they should appoint; and,
for want of appointment, to W. C. for life, remain-
der to his first and other sons in strict settlement, &c.
remainder to the right heirs of A. And, as to the re-
sidue of the estates, after the death of A. to the use of
C. and W. and their heirs, in trust, by sale or other-
wise, to raise money to pay the 1000*l.*—274*l.* 19*s.*
and all monies paid for interest or principal of the 5000*l.*
mortgage, and all monies which C. should have ad-
vanced or paid for A. and, after payment thereof, to
the same trusts as the other part of the estates were li-
mited to: with a covenant from C. to pay the 5000*l.*
and interest, and to indemnify A. against payment
thereof; and a covenant from A. that, in case he should
leave issue of his wife, his executors or administrators
should repay C. all money advanced by him.

* By indenture, dated the 3d of the same *June*, C. de- [* 118.]
mised to A. certain hereditaments for 99 years, for se- ^{Ibid.}
curing the payments of the mortgage and interest, and
indemnifying him therefrom.

C. paid the interest of the 5000*l.* but paid no part ^{Ibid.}
of the principal, and died intestate on 5th Feb. 1731,
without having made any appointment, leaving neither
real nor personal assets to make good his covenant; and
his wife died in *March* following. There were issue,
W. C. the eldest son and heir, and H. C. and B. C. all
then infants.

C. being dead, and not having left assets, and all ^{Ibid.}
the children being infants, and their guardian refusing
to interfere, and A. being called upon for payment of
the 5000*l.* and interest, and the estate conveyed to him
being incumbered to the full value, prior in time to
the conveyance to A. and he being thereby brought
into difficulties, he exhibited his bill in Chancery for a
specific performance of the agreement; or that, on
payment of the sums advanced by C. and re-con-
veyance of the estates contained in the deed of the
3d of *June*, the indentures of the 1st and 2d of
June

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[* 119.] *June* might be delivered up, and the estates be re- conveyed to A. or as he should direct. The infants, in their answer said, that they did not know whether it was for their benefit that the agreement made between A. and C. should be performed, or that the 5000*l.* and interest, should be paid out of the real estate of W. C. the eldest son and heir of C. or out of the rents thereof. On a reference to a master, he reported, that A. was of about the age of seventy-one, and that S. his wife was of the age of forty-three; that they had not any issue living, nor had *had* any for upwards of twenty-one years past; and that the estates of A. were of the annual value of 1180*l.* and were then worth, to be sold, 30,000*l.* and that the infant was then of the age of sixteen years, and was, from the death of his father, entitled to a real estate in possession, of the clear yearly value of 2650*l.* and upwards, subject to the raising of 8000*l.* and that there had been already saved out of his estate 3000*l.* then in the hands of the accountant-general, besides a considerable sum in the hands of the receiver, not accounted for; and that as A. was so far advanced in years, and had not, nor was there any probability of his having issue, and that as, whatever should

[* 120.] *be paid out of the infant's estate for the 5000*l.* and interest, would be secured to him with interest by the assignment of the mortgage, and by the estates vested in C. and W. in trust to be sold, and would continue part of the infant's personal estate; and, as his personal estate was not then sufficient to pay off the principal and interest of the mortgage, the master conceived, that it would be for the infant's benefit, that the arrears and growing payments thereof should be paid out of his personal estate; and that it would be likewise for his benefit, to pay off both principal and interest on the mortgage, as soon as his estate should be sufficient for that purpose. Whereupon, Lord *Talbot* decreed the infant to carry into execution the agreement between A. and his father.

Ibid,

The infant W. C. became of age in November 1741, and immediately appealed to the house of Lords from this decree and the proceedings thereon; suggesting, that he was neither executor nor administrator to his father, and that he claimed no part of his real estate, *except* what was settled upon him by strict settlement,

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* settlement, and in which his father had barely an estate for life that determined on his death; and that therefore he was not bound to fulfil his father's covenants. And, in case the court should compel him to a specific performance of this agreement out of his own estate without his consent, he would be in a worse condition by having been an infant at the time of hearing, than he could have been if of full age, since it could not be pretended that the court would have made such a decree against him, had he been of age, without his own express consent to it; that should he be obliged to pay the mortgage money, interest, and costs, which then amounted to 7850 *l.* or thereabouts, he could not be repaid any part of it, or any interest for his money, till after the death of A. who, though very old, was healthy, and might live several years; the money advanced by his father, and now due to his administrator with interest, amounted to 4850 *l.* and, if A. was then dead, these two sums, with the 5000 *l.* he had power to charge, making together 17,700 *l.* must be raised by sale of part of the estate in question; and, supposing the same to be worth 30,000 *l.* according to the master's report, what would remain of the estate would be worth no more than 12,300 *l.* * in which, by the settlement, the infant could have no other estate than for life, chargeable with 400 *l. per annum* to A.'s wife, who was little more than fifty years of age, and very healthy. From all which calculations, it would evidently be of prejudice to the infant to carry this agreement into execution; and that if the uses of the settlement had been truly represented to the master, so that it had appeared upon his report that the infant was only tenant for life, it was apprehended the court would hardly have made such a decree, or declared it to be for the infant's benefit to perform the agreement. But the reasons already suggested in the master's report being replied, and it being observed in addition, that it would not make the agreement on the whole less reasonable in itself, or more advantageous for A. that the infant happened to be only tenant for life of the estate, since this was evidently intended for the purpose of preserving the estate longer in the infant's family, and he being very young, would, according to the course of nature, probably enjoy the estate a great many years after A.'s death. Besides the infant's father had a power of limiting the inheritance of the estate to the infant, if he had thought proper to exercise that power.

Thereupon

[* 121.]

[* 122.]

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[* 123.] * Thereupon the appeal was dismissed, and the decree, orders, and reports, complained of, affirmed.

Higther v.
Sturman,
1 Vernon 210.
Vide Baskerville v. Baskerville, et ux.
2 Vern. 448.
1 Roll Abr. 351.
F. 1. et vid.
10 Mod. 160,
161, 243.

A mother may likewise, acting as administratrix to her husband, bind her children.

And the covenants of a woman, made *before marriage*, bind her after taken husband. Thus if, upon a treaty of marriage, by articles between A. father of the intended husband on the one part, and B. the intended wife on the other part, A. covenants that, in consideration of the marriage had, and of payment of a portion of 2600 *l.* he will settle his estates in manner therein stipulated, and B. covenants for payment of the portion; and the marriage be had, and then it fall out that part of the portion is so circumstanced that it cannot be had; and, thereupon, A. refuses to perform his part of the agreement, unless the portion be paid; the husband will be compelled, by decree, to make up the deficiency of the portion; though he be no party to the articles, his wife having, *whilst sole*, covenanted for payment thereof, and, consequently, bound him, after marriage, to perform that covenant.

[* 124.]
Mason v. Mason, cited Mosely 224.

* In the case of *Mason and Mason*, where a mother, who was both jointress and guardian, but had no power by her jointure to sell timber, entered into articles for the sale of timber to the value of 1000 *l.* these articles were carried into execution in equity.

Treat. Eq. 34.

It being a maxim in law, that the real estate of a feme covert shall not be bound without a fine, no agreement of the husband alone to part with the wife's inheritance will bind the wife, or be carried into execution in equity. But if the wife, upon a private examination, consent to an agreement by her husband to convey her lands, the court of Chancery will decree it. But the bill for this purpose must be filed against both husband and wife; for the wife ought not, by law, to convey by any compulsion from the husband, which it will otherwise be intended that she does.

Ibid.

But if a feme covert agree to sell her inheritance, so as she may have part of the money, and the land be accordingly sold, and her part of the money put into trustees hands: this money is not liable to the husband's debts, though she afterwards agree that it shall be

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be * so; nor shall any promise made by the wife for that purpose, subsequent to the first original agreement, be obliging in that behalf. [* 125.]

Tenant in tail cannot, by agreement to convey for valuable consideration without fine or recovery, bind his issue in tail or the remainder men; because the issue in tail claim *per formam doni*, from the creator or author of the estate tail; and, therefore, a court of equity, though the issue are in the power of the tenant in tail to be barred by a particular assurance, that not being had, cannot take away the right they derive, not from the tenant in tail, but from the author of the estate.

1 Lev. 238, 239.
2 Vent. 350.
Hob. 203.

Thus where A., tenant in tail, agreed that B. and his heirs should enjoy the entailed lands, provided A. and his heirs might enjoy B.'s copyhold lands; and the agreement was executed, and a decree was obtained against A. to levy a fine; and A. died in contempt for not doing it, and his issue entered on the entailed lands, whereupon a bill was filed to compel him to execute the agreement; it was adjudged that the issue was not bound thereby.

Rofs v. Rofs,
Ca. Ch. 171.
S. L. Powell v.
Powell, Pre.
Chan. 278:
Sangen v. Wil-
liams, cited
Gil. Rep. Eq.
164.

* But, if the issue enter upon the land, and accept of the agreement, it shall bind him; because by entering upon the recompence which his ancestor received for the estate tail, he makes himself a party to the original agreement, and is, therefore, bound in conscience to perform it. [* 126.]

So adjudged in
Rofs v. Rofs,
supra.

And a distinction is taken between cases where the lands are entailed *de facto*, and those where there is only an agreement to entail; for, though the agreement raises an equity against him that makes it, yet that equity is the creature of the court of Chancery, to be governed by it as conscience directs; therefore if a man, being tenant in tail in equity, bargain and sell his estate, the court will decree such disposition good against the issue; for, to this purpose, they construe their own creature as a fee simple conditional before the statute *de donis*, which became absolute by the having issue, and the donee whereof had thereby the power of alienating it.

Vide 1 Ch. Ca.
234, 236. Finch.
128.

Vide 1 Vern. 14.
2 Vern. 132,
135, 583.
2 Vent. 350.

It seems that, upon the same principle, the heir in tail of a copyhold, whose ancestor had entered into an agreement to sell, but had died before surrender, would, in a court of equity, be decreed to convey to the

the

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[* 127.] the purchaser; * for the entail of a copyhold remains as it was, at common law, and is not within the statute *de donis*.

Bro. Contract.
26. 11 Rep. 50.
Poph. 194.

And, as tenant in tail is restrained from aliening the estate without fine or recovery, so is he restrained from charging it; or disposing, by contract or agreement, of the lasting improvements after his death. Therefore if tenant in tail article for sale of the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail; for if he die before they are cut down, his issue shall have them as part of the inheritance, and the vendee shall not be permitted, after the death of tenant in tail, to fell one tree, though it be half cut down: for, as the tenant in tail has power over the inheritance but during his own life, he cannot delegate that power to another but during the same time; and consequently, whatever remains part of the inheritance at the death of tenant in tail, at which time his power over it ceases, must necessarily go to the heir to whom the inheritance belongs.

Vide to Mod.
469.

[* 128.] But if tenant in tail, having a power to make leases for three lives, covenant to make such a lease, and die before execution; it is * said, that a court of equity would carry this into execution against the heir.

Per Cancell.
2 P. Will. 197.

The executors of every person are implied in himself, and bound without naming.

Johnson v.
Ogilby, 5 P.
Will. 277. S. C.
2 Eq. Ca. Abr.
31. Pl. 40. Et
vid. 5 Brown's
Par. Ca. 547.

An attorney, having an authority, undertaking for and on behalf of his client, may bind him by an agreement, and will not *himself* be liable in case of non-performance. Thus if, previous to a trial, and just before it is to come on, the parties come to an agreement relative to the matters in question, and the attorney of the plaintiff or defendant alone sign the agreement for or on behalf of his client; a court of equity will hold this binding on the client; but will dismiss a bill for a specific execution against the attorney.

Parrot v. Wells,
et al. 2 Vern.
127.

But where an attorney prevented a person indebted from applying to his creditors to compound his debts, telling him, "that he need not trouble himself to go to his clients, for they would be governed by him, and would make no agreement without him; but what agreement he made they would stand by," and he thereupon agreed, on their part, for a certain composition, in consideration whereof the securities should be delivered

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vered * up, on performance by the debtor of his part [* 129.] of the agreement and refusal of the creditors to abide by the contract of their attorney, he was, upon a bill filed, decreed to indemnify the former according to the terms of the agreement.

A general authority to a steward to make contracts with the tenants, will not bind the lord without his consent and approbation, unless part of the bargain be actually executed. Per Lord Chan. Cowper, 5 Vin. Abr. 522. Pl. 35.

It is said that, if a joint-tenant enter into an agreement to alien, and neglect so to do, and die, a court of equity will not, by its decree, compel the survivor to perform the agreement. But this position must be taken with this limitation, that the articles are not such as amount to afeverance of the jointure in equity; for, if they be, the court will decree against the survivor. Vide 2 Vern. 63. Per Lord Hardw. 2 Vez. 634. et vid. 1 Inst. 59. b.

In the case of *Musgrave* against *Dashwood*, a copyholder for life, where, by the custom of the manor there was a widow's estate, agreed, That J. S. should hold and enjoy during his life, and the widowhood of the woman that he should leave at his death: after the death of * the copyholder, a bill was filed against the widow to have this agreement performed. But the court dismissed the bill with costs, saying, that if such contracts for copyholds should be decreed, the lords would be defrauded of their fines. Musgrave v. Dashwood, 2 Vern. 45, 63. [* 130.]

But Lord *Hardwicke*, in the case of *Hinton* and *Hinton*, over-ruled the foregoing case, so far as it extended to deny such a decree, where the agreement was for a valuable consideration paid as to the greatest part; or where the vendee had performed, or was ready to perform, his part of the contract. This was a bill filed for a specific performance of an agreement for a sale of a copyhold (and *that to the exclusion of the widow's free bench*) by a father to his son for valuable consideration, paid as to the greatest part, the father dying before an actual surrender. And Lord *Hardwicke* was of opinion, that by analogy to the determinations at law in similar cases, where the husband had actually parted with the estate, in which cases the widow lost her free bench, upon the ground *that the free bench estate of the wife was but a branch out of the estate of the husband*, the wife should, in equity, where there was Hinton v. Hinton, 2 Vez. 631, 638. Vide Rennington v. Cole. Noy, 29. Benson v. Scott, Salk. 185. Freeman 516.

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[* 131.] an agreement, be bound thereby; * for it was, in equity, a parting with the whole estate: then that court, considering the thing as done from the time at which it ought to be done, considered the vendor as a trustee for the vendee, and that those who came in his place ought to perform his agreement. And his lordship decreed a specific execution against the widow.

Different ways our assent may be given

III. Thirdly, We are to consider in how many ways an assent may be given to a contract or agreement.

An assent to a contract or agreement may be either express or tacit.

An express assent is declared by some sign: as gesture, speaking, writing, &c. and, in some cases, by solemn professions before magistrates, public registering, or the like. And such assent may be either precedent, concomitant, or subsequent.

A tacit assent may arise in several ways.

It may be inferred from inaction or forbearance of acting. Thus a man by his silence, in case he be present, and acquainted * with what is doing, is supposed to give his assent to what is then done; unless it appear that he was awed into silence, or any ways hindered from speaking.

[* 132.]

As if a prior mortgagee witness a subsequent mortgage-deed without giving notice of his claim: this act is considered as a tacit assent that his own security should be postponed.

Clare v. Earl of Bedford, cited
2 Vern. 151.
1 Will. Rep.
393.
Shep. Prac.
Comm. 432.
Pl. 9.

So if A. make a lease for years to B. upon good consideration, and afterwards he make a lease to C. of the same land for the same time; and B. drive the bargain, and be witness to the second lease, and do not discover this lease to C. and it be not excepted in the second lease, and the second lease be upon good consideration: in this case the second lessee will, even at law, be preferred.

Hansden v. Cheyney,
2 Vern. 150.
1 Eq. Ch. Abr.
355. Pl. 7.

Again, where a mother, to whom a term was limited in tail, stood by at a treaty for the marriage of her son, and heard him declare, that the term was to come to him after her death, and was a witness to the deed whereby the son took upon him to settle the reversion of the term expectant upon his mother's decease.

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* cease on the issue of that marriage, and did not mention or insist that she had more than an estate for life therein: on a bill filed by the issue of the marriage against the mother, praying that the issue should have the benefit of the marriage-settlement, and that the mother should make it good as to the reversion of the term after her decease; it was so decreed, notwithstanding she insisted that she was ignorant of her title, and knew not that she, as tenant in tail of a term, might dispose of it, and that she was no party to the marriage agreement, nor concerned in it. [* 133.]

And where A. upon his marriage with E. settled the lands in question, of which he was only tenant in tail, upon her for her jointure; and B. the younger brother of A. who was heir to the entail, was privy to the treaty, and ingrossed the jointure deed, but concealed the entail; and afterwards A. died without issue, and B. having the deed of entail in his custody, brought his ejectment, and recovered at law: E. filed her bill for relief, and B. by his answer, confessed the facts above stated, and that he had the deed of entail then in his hands, but did not mention his title, nor discover the deed, because * he apprehended his brother would dock the entail. [* 134.] The court decreed, that E. should hold and enjoy her jointure against B. and all claiming by or under him; which decree was affirmed on appeal to the house of Lords.

And, in such cases, assent is presumed, even against an infant; for it is meant as a punishment for his concealing his right, by which an innocent person is drawn in to advance his money, &c. Thus the court of Chancery granted a perpetual injunction against a mortgagee, who had engrossed a settlement, and not discovered that he had such a mortgage upon the estate; and yet the mortgagee was an infant at the time he ingrossed the deed. Barnard J. Rep. 102, 103.

But, in order to warrant us in concluding from a man's silence that he has relinquished his right, two things are necessary. The first is, That he should know that what belongs to him is conveying to another, for, when one forbears to act through mere ignorance, it can have no effect. Upon this principle Lord Hardwicke, in the case of *Welford* and *Beazley*, said, that he did not think the bare attesting a deed as a witness

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[* 135.]

Becket v.
Cordley,
Brown's Rep.
Chan. 337.

witness could create such a * presumption of his knowledge of the contents, as to affect him with any fraud; because a witness was only to authenticate an instrument, and not to be presumed privy to the contents. And Lord *Thurlow* declared himself to be of the same opinion in the case of *Becket* and *Cordley*, for, that, in such case, the property was bound upon the principle of notice, and a witness, in practice, was not privy to the contents of a deed.

Secondly, That he should be voluntarily silent, though he has full liberty to speak; for if there be any compulsion, that hinders him from acting, there is no ground, from his silence, to conjecture an assent to what is going forward.

The former principle governs in a court of law in cases where a lessee for a year holds over; for in such case he is not considered as a tenant at will, but as a tenant for a year; the law presuming, from the lessee's silence, a tacit agreement to renew the contract upon the original terms.

Vide *Tindal. et*

[* 136.]

al. v. Brown,
Term Rep.
vol. i. fol. 167.

So if the holder of a note, when it is dishonoured, omit to give reasonable notice to * the indorser, that he looks upon him as liable, and intends to resort to him; he will be considered as agreeing to discharge the indorser, and to accept the maker; for the omission of that information amounts, in law, to a tacit assent to give credit to the maker, and is tantamount to an agreement to discharge the indorser.

Many instances of this kind occur in cases, where, to give effect to some great leading contract, founded upon an express agreement, some other tacit agreement must, from the very nature of the transaction, be included therein. Thus if a man bargain with another for the sale of his trees, the law implies that the vendee shall have free ingress and egress to take them; because, otherwise, the former agreement would be to no purpose. So he who lets a chamber, is presumed to consent that the lessee shall make use of such other parts of the house as are necessary to give him free access to this apartment, and free passage from it. And if a man give leave to another to lay pipes of lead through his lands, the law infers a tacit agreement, that he may dig the ground to lay them there.

Godbolt 358.

And

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And there is one species of tacit agreement * which [* 137.] runs through, and is annexed to all contracts, conditions, and covenants; namely, that if one of the parties fail in his part of the agreement, he shall pay the other party such damages as he has sustained by such neglect or refusal.

Thus where, on payment of 262 *l.* 10s. by A. to Dutch v. Warren, M. 7 G. 1. B. the latter agreed to transfer five shares in the *Welsh* copper mines at the opening of the books, and for security gave A. a note in these words, "18 August 1720, I do hereby acknowledge to have received of A. 262 *l.* 10s. as a consideration for the purchase of five shares, which I do hereby promise to transfer to the said A. as soon as the books are open, being five shares in the *Welsh* copper mines. Witness my hand." The books were opened, when A. requested B. to transfer these shares, which he refused, and told A. he might take his remedy. A. brought an action upon the case for money had and received to his use. The chief justice left it to the consideration of the jury, whether they would not make the price of the stock, as it was on the day when it should have been delivered, the measure of the damages, which they did, and gave the plaintiff but 175 *l.* damages. And, on a case made for the consideration of the court of * Common Pleas, it was resolved that the verdict was right, being not for the whole money paid, but for the damages in not transferring the stock at the time, which was a loss to A. and an advantage to B. who was a receiver of the difference to the use of A. [* 138.]

So if one usually send his servant to market upon trust, and, when he takes up goods, stand to the bargain; this is evidence of his assent that all the world should trust him; and may be applied by a jury to evince an assent to any particular contract.

There is also another kind of assent that may be considered as tacit or presumptive, though it be purely imaginary. This is where a person doth not think, nor indeed can think, of the engagement he enters into, because he is ignorant on what it is founded; yet he is still supposed to acquiesce in it, because we presume that, if he knew the thing, either he would consent to it as beneficial to himself, or should consent to it according to the maxims of natural equity.

Upon this principle, the law, upon every feoffment, release,

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[* 139.] release, surrender, gift * or assignment, vests the property thereby conveyed in the feoffee, releasee, surrenderee, donee, grantee, &c. his assent thereto being presumed, it appearing *prima facie* to be for his interest.

So the heir's acceptance of an inheritance descending to him is presumed.

Smith, et al. v.
Nesken, et al.
Term Rep.
vol. i. 269.

Again, If the persons, upon whom a bill is drawn, refuse to accept upon account of the credit of the indorser, but pay the bill for the honor of the drawer: this raises an assumption, founded upon a tacit agreement, upon which an action for money paid, laid out, and expended, may be maintained against the drawer.

So if the husband turn his wife out of doors, this, in law, amounts to a tacit assent to give her credit for necessities; and, upon that ground, subjects him to an action, as before stated.

*what circumstances in-
validate such assent.*

IV. Fourthly, I shall consider what circumstances invalidate an assent given.

Ignorance or error, in some cases, renders a contract or agreement invalid, by invalidating the assent given to it by one of the parties.

[* 140.]

* In this respect a distinction is made, where the person, lying under the error or mistake, was drawn in to contract by fraud and circumvention, practised by one of the parties in taking advantage of the other's ignorance of his right, or concealing it from him; and where there proves to be an error or mistake respecting the thing or subject bargained for, equally unknown to both parties: for, in the former case, the contract or agreement will be null and void in itself; because, in all bargains, where the nature of the thing contracted about, and all its qualities, good and bad, are explained, and conceived to be understood, the assent is yielded under an idea, that the facts are strictly as stated.

Branderick v.
Branderick, 1 P.
Will. 239. S. C.
4 Vin. Abr. 534.
S. L. 1 Vern.
19, 20.

Therefore, where one devised his lands away from his heir at law, but did not execute his will according to the statute of frauds; and afterwards the heir at law, in consideration of 100 guineas paid him by the devisee, did, by deed, *revising that the will was duly executed*, release to the devisee all his right to the estate devised; and then the heir at law, being told by the devisee, that, there being debts appointed by the will to be paid, it would facilitate the raising the money for the payment of debts, if he (the heir) would join

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* join in a lease and release of the devised premises; whereupon, for 50 guineas more paid to him, the heir, together with the devisee, by lease and release, conveyed the premises to J. N. and his heirs, in consideration of 4000*l.* mentioned to be paid by the purchaser. And a receipt was given for the money, but, in truth, the purchase money was not paid, but J. N. was a trustee only for the devisee, and so admitted to be. A bill was filed by the heir at law, to be relieved against these assurances. One witness swore, that the heir did declare to him, that the will was not worth any thing; and that this declaration was made by him, before his executing the release. *Per curiam.* Either *suppressio veri*, or *suggestio falsi*, is a good reason to set aside any release or conveyance: then, to recite in a deed that the will was duly executed, when it was not, was *suggestio falsi*; and to conceal from the heir that the will was not duly executed, was *suppressio veri*. So that both circumstances concurred. And as to the declaration of the witness, it was said, it was not to be believed, that, if the heir had known that the will was not duly executed, he would, for so small a consideration, have parted with his estate. And the court relieved the heir. [* 141.]

* But, if it plainly appear that there was no intention of fraud in either of the contracting parties, and that the one had no more knowledge of the thing contracted about than the other; there, if, in a doubtful point, one party mistake, it is so much the worse for him, but the contract is valid notwithstanding; for the assent is complete and full to treat upon the subject as it stands. [* 142.]

Thus it was laid down by Lord *Macclesfield*, in the case of *Cann and Cann*, where two parties were contending in the court of Chancery respecting an estate, and one released his pretensions to the other; that there could be no colour to set this release aside, because the man that made it had the right; for by the same reason there could be no such thing as compromising a suit, nor room for any accommodation: every release supposed the party making it to have a right; but this could be no reason for its being set aside, for then every release might be avoided. That, therefore, an agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards came out that the right was on the other side, should be binding; and the right should not prevail against the

Cann v. Cann.
1 P. Will. 726.

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[* 143.] the agreement of * the parties, for the right must always be on one side or the other; and therefore the compromise of a doubtful right was a sufficient foundation of an agreement.

Pullen v. Ready,
2 Atk. 587.

So where one devised his estates in remainder, after an estate limited in tail, in trust for his niece E. and her sons and daughters in tail, and went on, "*Item, It is my will, and I do hereby declare, that if the said S. and M. (two daughters of E.) or either of them, shall hereafter marry with any person or persons whatsoever, without the consent of their father and mother, and the trustees named in the said will, or the greater number of them living, signified under their hands, then it is my will, that such of the daughters, so marrying, shall have and receive no more benefit and advantage by my said will, or any thing therein contained, than if they were actually dead, or not named in my said will, either by particular names or daughters in general.*" E. the mother had three daughters, R.—S. and M. afterwards M. married without consent, and then a lawsuit arose between the sisters and their husbands as to the fortunes of the wives. And then articles of agreement were entered into and executed between all the * parties, by

[* 144.]

which, among other things, it was agreed, that, after the death of E. the mother, who, was then tenant in tail, an equal division should be made between the daughters of all the estates belonging to the testator. Afterwards R. one of the daughters, and her husband, objected to M.'s having any share of the testator's estate upon the ground that she, marrying without consent, had forfeited her right in the third of what was to come to her upon the death of her mother, and, in order to get rid of the agreement, insisted that they executed the articles under a mistake. Lord *Hardwicke* said, that there was nothing more mischievous than for a court of Chancery to decree a forfeiture after an agreement, in which, if there was any mistake, it was the mistake of all the parties to the articles, and no one of them was more under an imposition than the other; and he decreed them to be carried specifically into execution.

Pusey v. Disbouverie, 3 P. Will. 316.

But in such cases the parties must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, or otherwise the inclination of courts seems to be that they shall not be bound. Therefore where one, being a free-
man

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* man of *London*, and having a wife, a son, and a daughter, compounded with the wife as to her customary part; and then made a will, giving, *inter al.* 10,000*l.* to his daughter, upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of *London*, or otherwise, and made his son executor, his daughter being about the age of twenty-three years. And the daughter, after having been informed by her brother that she had an election to have an account of her father's personal estate, and to claim her orphanage part, elected the legacy, and executed a release of her share under the custom. Lord *Talbot*, on an application by her after taken husband to set this lease aside, on the ground that her customary share would have been 40,000*l.* was induced so to do; because his lordship said, he hardly thought she knew she was entitled to have an account taken of the personal estate of her father, in order to ascertain what her orphanage part would amount to, and that when she should be fully apprized of that, then, and not till then, she was to make her election; for probably she would not have elected to accept her legacy, had she known or been informed what her * orphanage part amounted unto before she waived it and accepted the legacy. [* 145.]

Under the head of Contracts, under an ignorance that does not invalidate the contract for want of consent, we may class Wager Contracts, to the validity of which, it is not essential that the event be in itself contingent. For here it is sufficient that the event be equally uncertain to the parties.

Therefore, where an action was brought to recover money won upon a wager, whether a decree of the court of Chancery would be reversed or not on an appeal to the house of Lords. And it was objected, on motion in arrest of judgment, that the contract was void; and one ground urged against it was, because the event was not contingent, but certain, for the laws of this country were clear, evident, and certain. All the judges knew them, and, knowing them, administered justice with uprightness and integrity. The event, therefore, was certain, and of course the wager such as in its nature was impossible to be lost. *Sed per curiam*: this contract is equal between the parties; they have each of them equal knowledge or equal ignorance; [* 146.]

Jones v. Randall, Cowper 37.

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[* 147.] rance: it is concerning * an event which, reasoning by the rules of predestination, is to be sure so far certain, that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties, whether the house of Lords would be of the same or a different opinion with the chancellor. The presumption, if any, rather against the person betting in opposition to the chancellor's judgment.

Here we may likewise consider those cases, in which agreements are made for the purchase of estates, and the like, which estates are afterwards found, in circumstances, to have been erroneously represented to the purchaser. In these cases a distinction is made according to the nature of the circumstances mistaken, or respecting which there is error. If the mistake be respecting *that*, at which the person making the contract particularly aimed, the agreement will be void, his assent being founded on the ground, that the thing in which the error lies existed, or was wanting. Any deviation from the terms of the contract in these respects, is, therefore, essential. But, if the error be in some circumstance, which, although the purchaser would have been better pleased with his bargain had it existed, yet he did not * particularly aim at and specify in his contract; here the bargain will be good, and the defect will lie in compensation: for the existence, or non-existence of this circumstance, does not appear to have been considered as an essential motive to the assent given; and then the gist of the contract is the value of the thing contracted for, which, in case of any variation, may be equalized by deducting the difference of value out of the purchase money.

As for example, suppose a man contracted and agreed to sell an estate, and in his description stated it to be tythe-free, and it afterwards turned out to be subject to tythes; if it were not evidently the intention of the party contracting for the purchase that it should be tythe-free, so as that were the express motive to his assent, the being subject to tythes would not invalidate the agreement; for, whether it be so or not is an accident, and has nothing to do with the essence of the contract: it is considered, therefore, as not affecting the assent to purchase, but merely as giving the vendee a right to call upon the vendor for an abatement of price, in proportion to the inconvenience or diminution of value, that the being tythable occasions.

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* So if a man were to agree to purchase an estate upon a particular, in which it were stated to consist of a manor, lands, &c. and it turned out that the manor belonged to another person, and not to the vendor. The bargain would, nevertheless, be carried into execution, in equity, subject to an abatement in price, according to the value at which the manor was estimated. And, yet, it may be very material in the consideration of the purchaser, whether, he, or another person, be lord of the manor extending over his estates. But such circumstances are, nevertheless, considered, in equity, as laying in compensation merely. [* 149.]

To put this principle of equity, in a still stronger light. Suppose an estate with a manor were sold by a particular, specifying the value of each part, and wherein the manor were thrown in as a make-weight, and, on a valuation taken, at the instance of the vendee, the estate were valued, without the manor, at the sum stipulated to be paid for it with the manor; and it turned out that the manor was in another person, and not in the vendor; in such case it appears to me, that the bargain ought to be carried into effect, in equity, without any deduction from the sum * stipulated for the purchase. For, considering the ground upon which the parties contract, the vendee is no loser by the deficiency. The contract still remains equal upon their estimation. [* 150.]

But if the buyer make it an express condition in the agreement for the purchase, that the lands be tythe-free, or that there be a manor, and the seller covenant therein to that effect; then, unless the fact turn out as stipulated, the contract will be null.

And, in some contracts, the intention of the parties, as to the nature of their assent, will be inferred from circumstances; as from price, or the like. Thus if a man sell a horse for a price, which it could not be worth, unless it were found, the contract will be void, if it turn out otherwise; for the purchaser would never have consented to give a found price, unless he were to have a found horse.

This principle is illustrated by the writers on natural law by a very apposite instance, namely, that of a female slave clothed in the dress of a man, and offered to be hired or sold in that character.

In

* See *quest.*

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[* 151.] * *In such case the difference of the sexes is only to be known by their habits, and, consequently, cannot be mistaken, unless under a disguise. And, therefore, the hirer must be supposed to have consented to the agreement, under the assurance that the servant was of that sex whose habit she wore, and then the error is essential, and consequently, the bargain is null and void.*

Of the Subjects of Contracts or Agreements.

HAVING shewn what persons are capable of contracting, or being contracted with; we are necessarily led, in the next place, to consider the subjects respecting which contracts may be entered into, and in what respects men may lawfully bind, or oblige themselves by their words, or bargains.

And it is observable, upon this branch of our enquiry, that a distinction subsists between contracts that are executed, and such as are executory. For it is a known rule of law, that a man cannot by contract, executed, grant or convey any thing, in which he has not an actual or potential interest, at the time of the grant or conveyance; because it is necessary that he, who by his contract makes another possessor of any thing, should first be, himself, the proprietor of it. In our law, therefore, every contract executed, respecting a subject of which the party *conveying is not owner, actually or potentially, at the time of entering into it, is void. [* 153.] Thus, if a man grant all the wool that he shall buy *hereafter*, this is a void grant; for he has the wool neither actually nor potentially. Plowd. 432.
Hob. 132.

So if one make a lease of lands to another, and the lessor has, then, no interest in the lands leased; it is a good plea for the *lessee* to say, "that the lessor had nothing in the lands *at the time of the lease*." Co. Litt. 41. b.

Upon the same principle, if one grant unto another a rent-charge out of white acre, and that it shall be lawful for the grantee to distrain in all the other lands whereof the grantor is then seised, and in those which he shall *thereafter* purchase; although this be but a liberty of distress, and no rent, except out of white acre, yet the clause is void, as to the lands to be purchased afterwards. Bac. Max. 78.

So, if a reversion had (when attornment was in use) been granted to J. S. and afterwards J. D. (a stranger) had, by his deed, granted to J. S. that, if he (J. D.) purchased Ibid.

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[* 154.] * purchased the particular estate, he would attorn to the grant; this had been a void attornment, notwithstanding J. D. had afterwards purchased the particular estate.

Co. Litt. 309. b. Upon the same principle, it is laid down by lord Coke, that if, before the 4. Ann, cap. 16. sect. 9. the conusee of a fine, previous to attornment, had bargained and sold the seigniority to another; the bargainee could not have distrained; and the reason is, because the *grantor* could not have distrained; *and no man can transfer more right to another man, than he has himself.*

Plowd. 432.

Again, if one, being possessed of a horse, sell the horse to another, upon condition that he pay forty pounds for it at *Christmas*: the contract being completed as soon as the price is agreed upon, he cannot, afterwards, and before *Christmas*, sell it to a third person. Nor will such latter sale be made good, though the first vendee fail of payment, by reason whereof the vendor re-seizes the horse; because, at the time of the second contract, the vendor had neither interest, nor property, nor possession of the horse, but only a condition, which will not enable him to contract * for the property and possession; therefore, it is merely a void act.

[* 155.]

Bac. Max. 78.

And if A. grant unto B. that if B. enter into an obligation to A. of 100 l. and afterwards procure him *such a lease*, then the same obligation shall be void. And B. enter into such an obligation unto A. and afterwards procure such a lease, yet the obligation is simple; because the defeazance was made of that which was not.

19 H. 6. 62.
a 64. a Bro.
Grant. 40.

So if A. grant to B. by deed, that if B. make unto A. an obligation for any sum, it shall be void; and afterwards B. enter into such an obligation to A. the grant is void: because it is the grant of a duty that A. had not in him at the time of the grant; and every man may bind himself to what he pleases.

Dyer, 221. Pl.
18.

Nor will the law allow a man to grant or incumber that in which he has only an inchoate title, or interest to be perfected in future. Thus, if a writ of annuity were granted by a prebend, after collation, admission, and institution, but before installation or induction; such a grant, though it were confirmed by the ordinary, he

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he being the patron, * would be void; because the prebend had *jus ad rem* and a future interest, and not *jus in re*; for he cannot be said to be a prebendary to all intents, nor at the common law, without the real possession, which is given him by induction.

[* 156.]

But we must distinguish the last-mentioned case, from those cases in which, although it be uncertain whether the thing granted will ever exist, and it, consequently, cannot be *actually* in the grantor or certain, yet it is in him *potentially*, as being a thing accessory to something which he *actually* has in him; for such *potential* property may be the subject of a contract executed, as a grant, or the like. Thus a parson may grant all the tithe that he shall have in such a year, yet, perhaps, he shall have none; for the right to the advowson, &c. is in him, and out of *that* advowson they arise. So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then in *esse*. Upon the same principle, a lord of a manor may part with the profit of his courts for a time to come.

22 H. 6. 43.

This principle was investigated and * confirmed in the case of *Grantham* against *Hawley*. There, one seised of land, let the same by indenture for twenty-one years, and covenanted therein that it should be lawful for the lessee, his executors and assigns, to carry away, to his own use, such corn as should be growing upon the ground at the end of the term; and afterwards the lessor assigned his reversion. And one question was, whether the lessee was entitled to corn so growing? and it was argued on the part of the assignee of the reversion, that it was merely contingent, whether there should be corn growing upon the ground at the end of the term or not; and that the lessor never had property in the corn, and, therefore, could not give nor grant it; for the right to the corn, standing at the end of the term, being certain, accrued with the land to the lessor. But judgment was given against the reversioner: because it was said, that the property, and very right of the corn, when it came into being, was passed away; for this was both a covenant and a grant; and, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Then, though corn were *fructus industrialis*,

[* 157.]

Grantham
v. *Hawley*,
Hob. 132.

so

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[* 158.] * so that he that sowed it might seem to have a kind of property *ipso facto* in it, divided from the land, and, therefore, it would go to the executor, and not to the heir; yet, in this case, all the colour the reversioner had to it was by the land, which he claimed from the lessor who gave the corn; and, though the lessor had not the corn actually in him, nor certain, yet he had it *potentially*; for the land was the *mother* and root of all the fruits. Therefore he that had *that*, might grant *all* fruits that might arise upon it afterwards, and the *property* would *pass* as soon as the fruits were extant.

And where contracts are executory, operating as declarations precedent, and to the perfection of which some new act or conveyance is necessary to give them life and vigour, the law admits of them, although made before any interest vested.

Bacon's Max.
79.

As if a man covenant with J. S. by indenture, that before such a day he will purchase the manor of D. and before the same day levy a fine of the same land, and that the same fine shall be to certain uses which are expressed in the indenture. This indenture * will bind the land, though it be purchased after; because there is a new act to be done, *viz.* the fine.

[* 159.]

Bac. Max. 80.

So if I grant unto J. S. authority, by my deed, to demise for years the land whereof I am now seised, or *hereafter* shall be seised, and after I purchase lands, and J. S. my attorney, demise them: this is a good demise, because the demise of my attorney is a new act, and all one with a demise by myself.

Ibid. 79.

But if there were no new act to be done, then it would be otherwise: as if a man should covenant with his son, in consideration of natural love, to stand seised unto his use of the lands which he should *afterwards* purchase, the use would be void. And the reason is, because there is no new act, nor transmutation of possession following, to perfect this inception; for the use must be limited by the feoffor, and not by the feoffee, for the feoffee had no interest at the time of the covenant.

Ibid. 80.

So, if A. mortgage land, and afterwards covenant with J. S. in consideration of money which he receives from

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from him, that, after he * has entered for the condition [* 160.] broken, he will stand seised to the use of J. S. and A. enter, and this deed be enrolled, and all within the six months, yet nothing passes; because the enrolment is no new act, but a perfective ceremony of the first deed of bargain and sale; and the law is more strong in this case, because of the immediate relation that the inrolment has to the time of the bargain and sale, at which time the bargainor had nothing but a naked condition.

So, if there be two joint-tenants, and one of them bargain and sell the whole land, and before the inrolment his companion die, nothing passes of the moiety accrued by survivor.

Another observation apposite to this part of our subject is, that the right of disposing, being a right commensurate with and correlative to property, cannot be extended beyond the ability of the party contracting to dispose; because it is vain and impertinent to contract about matters which are unattainable. It follows from hence, that no right can be created, nor obligation be incurred, from a contract to perform things *naturally* impossible. And, therefore, were * one man absurd enough to covenant with another to build him a large house in a day; or to go to *Rome* in the same time; or to overturn *Westminster Hall* with his finger; or to make the *Thames* overflow *Westminster Hall*; or to drink up the sea; or touch the sky with his hand, or such like impossibilities: such contracts would be void; and the party, undertaking to accomplish them, would be subject to no action, even for damages accruing, by reason of non-performance.

But we must distinguish here, between things naturally impossible, and the impracticability of accomplishing of which must be evident to *all parties* at the time of contracting; and things which are not *physically* impossible, but the impossibility of accomplishing of which arises from circumstances peculiar to the party contracting; for, in the latter cases, although the main contract be of necessity void, by reason of the inability of the person undertaking to perform it: as if a man contract to sell an estate, the title to which is in another person; yet, though equity will not enforce a specific execution, *that* will not discharge the person contracting to sell, from paying damages to the other party for any loss he may sustain by reason of his being im-

Bro. tit. fairs
[* 161.]
37. Et vide
Fitzh. Oblig 13.
Puffend. lib. 3.
sec. 2. Et ibid.
note 1. 40 E. 3.
6. 2.

Cornwall
v. Williams,
Colles's Ca. in
Parl. 117.

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[* 162.] posed * upon; for, although, where a person covenanting, through remissness and negligence, undertakes an impossibility, so far as goes to his capacity of performing, the main undertaking must be void; because, *that the thing stipulated is practicable to the party stipulating to perform it*, is presumed as a tacit condition in the contractor's mind in every agreement; the law, nevertheless, upon account of the neglect and default of the undertaker, binds him to answer any damages as a *compensation for the non-performance of the thing contracted for itself*, that, as being impracticable to the party, not requiring any.

Thornborough
v. Whitacre,
2 L. Raym.
1164. S. C.
6 Mod. 305.

Thus where A. in consideration of 2s. 6d. in hand paid to him, and of 4l. 17s. 6d. to be paid to him upon his performance of the agreement, contracted to deliver to B. two grains of rye-corn on the *Monday* following, and so on progressively, doubling the quantity on every *Monday* during the year: it was objected, on an action on the case brought upon this agreement, that it appeared, upon the face of it, to be impossible, the rye to be delivered amounting to such a quantity, as all * the rye in the world was not sufficient to produce. *Sed per curiam*, if a man will, for a valuable consideration, undertake a thing impossible with respect to his ability, that will not make the contract void; for though the contract be a foolish one, yet, it will hold in law, and the person so contracting ought to pay something for his folly. And the cause was compromised on re-payment of the half crown with costs.

[* 163.]

And where the term "*impossible*," in its *physical* sense, is applied to an agreement, it is to be taken in its fullest extent; and, therefore, a man may bind himself to do any thing, which is not strictly impossible, and the law will hold him to the performance of it. The legal distinction, therefore, between a near and remote possibility, is not regarded in executory contracts. And, therefore, if A. covenant with B. that, in case he die without issue, he will give his lands in D. to his brother; a court of equity will carry this agreement into execution, upon the contingency happening, *although a limitation in a deed "after dying without issue" would be void*. So a covenant to settle lands, of which a man has only a possibility of descent,

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will be carried into execution * in equity : for a decree of that court does not attach upon the *interest* in the land stipulated about ; but the court enforces the performance of the *agreement in specie*, by its *process* against the *person* to compel him to execute it. [* 164 .]

And the subject of every contract must not only be a thing *naturally* possible to be accomplished, but it must also be *morally* so ; for to give an agreement an intrinsic obligatory force, and fit it to produce an action in courts of justice, it is not enough that it be made with the consent of both parties, but the subject of it ought to be such a thing, as men have a *lawful* right and power of stipulating about at their pleasure. Therefore, to make an agreement truly obligatory, it is requisite that the party undertaking, have a *moral*, as well as a *physical* power, of performing the thing agreed upon. It follows, that an engagement to do a thing in itself unlawful must be void ; for it would be absurd that an obligation, which derives its sanction from the law, should put us under a necessity of doing something which the law prohibits. All acts, therefore, undertaken against legal constitutions are, by virtue of the law, null and void upon two grounds ; namely, first, * because where the object of a contract is contrary to a man's duty, it may be presumed that he did not give his full and free assent, especially if it be to perpetrate any crime, as murder, theft, or perjury. Secondly, because the law, by forbidding it, takes from the contractor the power of obliging himself to do it, and, by consequence, prevents the person contracting from gaining any right of requiring it to be done. It becomes, therefore, necessary for us in order to have a clear conception of the law of *England* as to the subject of contracts, to consider in what respect matters or things are said to be against law. [* 165 .]

Matters or things, against law, may be said to be so in two senses ; viz. First, in a proper ; Secondly, in an improper sense.

All matters or things, against law, in a proper sense, Vide 1 P. Will. 189.
are reducible under three heads.

First, either to do something that is *malum in se*, or *malum prohibitum*.

Of the first kind, are all contracts that have for their object something forbidden by the eternal immutable

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[* 166.] table laws of nature and of God: *as to commit murder, theft, perjury, or the like; which contracts acquire no additional turpitude, from being declared unlawful by any legislature.

Fitz. tit.
Oblig. 13.

Therefore if I be under an obligation to pay you 20*l*. if you kill or rob such a person: this is a void obligation, and creates no right.

Co. Litt. 206. b.

The second denomination of contracts, void on the ground of being contrary to law, *viz.* those that are *mala prohibita*, applies to things, which, though they be not *mala in se*, or contrary to the law of God and nature, yet are bad as being against the law of the land: because they are either repugnant to the welfare of the state; or against some maxim or rule in law; or in contradiction to some positive statute.

Alleyne 67.

Among the first of this description, namely, of such as are repugnant to the welfare of the state, all contracts or agreements, that have for their object a restriction of trading in any particular way in *general* throughout *England* are ranked; all such contracts being void, *as militating against national policy*, one great object *of which is, and ought to be, to encourage and promote trade, and, consequently, to invalidate all contracts that have a tendency to check or restrain the exercise of it.

[* 167.]

Upon the same principle, namely, to prevent any stipulations that have a tendency to discourage trade, every contract, that has for its object *a general restriction* not to exercise a trade within a limited period of time, is likewise void. Therefore if a dyer enter into an agreement **not to use** his craft for two years, it will be void; for such restraint must not be total, although it be temporary only.

1. H. 5. 5b.
Bro. tit. Oblig.
85.

11 Co. 53. b.

So if a husbandman be bound not to sow his land; the bond is against common law.

But the same objection does not apply, to an agreement, not to trade in any particular place; for the policy of the nation is not concerned in what place a man exercises his calling. And there may happen instances wherein such a contract may be useful and beneficial: as to prevent a town from being overstocked with any particular trade: or in the case of an old man, who, perceiving himself under such circumstances

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stances of body or *mind, as he is likely to be a loser [* 168.]
by continuing his trade, will find it better to part with it
for a consideration, that, by selling his custom, he may
procure to himself a livelihood, which he might proba-
bly have lost by trading longer.

Therefore it has been held, that an assumpsit may be
maintained upon an agreement not to keep a mercer's
shop in *Newport*; for the undertaking is voluntary, and
the party restrained, may, notwithstanding, keep a mer-
cer's shop elsewhere.

But a contract of the latter kind will not be binding,
unless entered into for a good and sufficient consideration;
for if it be without consideration, it will be void.

And it is best that such good or sufficient considera-
tion should appear upon the face of the contract: because,
wherever such contract stands indifferent, and, for
aught that is known, may be either good or bad, the
law presumes it *prima facie* to be bad. First, in favour
of trade and honest industry. Secondly, for that there
plainly appears a mischief, but the benefit can be only
presumed, and in that * case, the presumptive benefit
shall be overborne by the apparent mischief. Thirdly,
for that the mischief is not only private but public. And,
fourthly, for that there is a sort of presumption, that it
is not of any benefit to the obligee himself; because it
being a general mischief to the public, every body is af-
fected thereby: for it is to be observed, that though it
be not shewn to be the party's trade or livelihood, or
that he had no estate to subsist on, yet all the books con-
demn those bonds on that reason; viz. as taking away
the obligor's livelihood, which proves that the law pre-
sumes it.

But Lord C. Just. *Parker* was of opinion, in the
case of *Mitchel* and *Reynolds*, that where it did not ap-
pear on the face of such a contract, whether or no the
contract were made upon good consideration, or were
merely injurious and oppressive, that might be shewn
by pleading; though certainly the case might be settled
either way without prejudice.

And formerly a distinction was taken, in the case of
such a contract for restraining the trading in a particu-
lar place, between a contract or promise upon good
consideration,

Broad. v. Jolly,
&c. Cro. Jac.
596. S. C.
2 Bulst. 136.
Jones 13.
Palmer 172.
Chefman v.
Nainby,
2 *Strange* 739.
1 P. Will. 161.

Alleyn 67.
Moor 115, 242.
Palm. 172.
March 17.
1 P. Will. 192.

[* 169.]

Mitchel v.
Reynolds,
1 P. Will. 192.

3 *Lev.* 242.
March 77, 193.
Moore, Pl. 259
379. 2 *Leon.*
210. *Noy* 98.

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[* 170.] consideration, and * a bond or a covenant to pay a sum *certain* on breach of such undertaking; the former being held valid, and the latter, even although it were for a good consideration, void. The reason for which distinction was, that, in the former cases, the whole being to be recovered in damages, it was in the power of the jury to assess them according to the nature of the consideration, and the injury received; but, in the latter cases, the whole penalty or sum was forfeited, and might be recovered in an action of debt, whatever might be the consideration given, or however slight the injury received.

Mitchel v.
Reynolds,
1 P. Will. 181.

But, in the case of *Mitchel* and *Reynolds*, the distinction was over-ruled, upon the following grounds: viz. First, that a bond is a more favourable contract for the obligor than a promise; because the penalty is a re-purchase of the obligor's trade ascertained beforehand, and on payment whereof he may have it again; and a man may rather chuse to be bound not to do it under a penalty, than not to do it at all. Secondly, for that, however it be, it is the obligor's own act. Thirdly, because the obligor can suffer only by his knavery; and courts of justice are not * concerned lest a man should pay too dear for being a knave. Fourthly, because restraints, by the custom of particular places, may be enforced with penalties which are imposed with the parties consent, nay, where they are imposed by the injured party without the concurrence of the other; then, *a fortiori*, the obligor may bind himself by a penalty. And, fifthly, because the question, whether upon the consideration of the circumstances the contract be good or not, is matter of law not fit for a jury to determine.

[* 171.]

And, in the consideration of these kind of bonds, entered into with a view to restrain persons from exercising their trades within particular districts, courts of equity advert to the object of the bond; making a distinction, where the penalty of the bond is merely intended as a security for the enjoyment of the object stipulated for, and where it is in the nature of assessed damages; and, in the former case, these courts consider the enjoyment of the object as the principal intent of the deed, and the penalty only as accessory, and to ensure the damage *really* incurred; to ascertain which, they direct an issue to try *quantum damnificatus*, and, thereby, give the same remedy upon a bond,

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* bond, as might have been procured if the contract had [* 172.] rested upon a promise only.

This was done by the lords commissioners in the case of *Hardy and Martin*. There A. and B. had been partners as brandy-merchants; and, on A.'s quitting the business, and selling the lease and good-will of the shop to B. for 300*l*. B. entered into a bond, in 600*l*. penalty, not to sell, for nineteen years, any quantity of brandy less than six gallons, within the cities of *London* and *Westminster*, or five miles thereof, nor to permit any person to do the same, &c. And upon a breach of this contract, an action was brought, and a verdict given for the penalty; whereupon the plaintiff filed a bill, praying that an account might be taken of the actual damage sustained by the defendant, and an issue directed for that purpose; and that, on payment of the damages, the defendant might be restrained from taking out execution for the penalty of the bond. And it was decreed accordingly.

Hardy v. Martin, Brown's Chan. Rep. 419. in note. Et vid. *Errington v. Anelly*, Bro. Chan. Rep. 1788, fol. 341.

The next instance that occurs to me of a contract void, as being *malum prohibitum*, as militating against the public welfare, is that of a bond, or an agreement for unlawful * maintenance; which is an unlawful upholding in a cause depending in suit by word, writing, countenance, or deed, and is void as being *inequum in lege*.

Carter 299. 2 Inst. 212.

Upon the same principle a bond, taken by a sheriff for fees, is void: First, because the sheriff, by the common law, was to take no fees at all for discharging the duties of his office; and, therefore, whatever fees he is entitled to, being given by act of parliament, the act must be strictly pursued. Secondly, from the apparent probability, that sheriffs would make use of such bonds to support oppression.

[* 173.]

10 Mod. 159. 1 P. Will. 195.

And if a sheriff, or gaoler, take a bond of a prisoner with condition to be a true prisoner, or to pay for his meat or drink, such obligation is void; the law prohibiting it, as a means that might be made use of for purposes of extortion.

Plowd. 68. 10 Co. 100 b. 12 Mod. 683. *Vin. Abr. tit. Condition U.* Pl. 10.

An obligation entered into with an alien enemy, has been likewise held to be void; upon the ground, that a communication between the king's subjects and persons of that description, may endanger the public safety.

Bro. tit. Oblig. 54.

And,

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[* 174.]

* And, for the same reason, viz. *that they militate against the general welfare of society*, marriage brokerage bonds, given for assistance in promoting marriages, are void; for marriage ought to be procured and encouraged through the mediation of friends and relations, and not by hirelings; and such bonds to match-makers, and procurers of marriage, are of dangerous consequence, proving the occasion of many unhappy marriages, to the prejudice and discomfort of the most respectable families. And, therefore, the consideration of such bonds and securities have always been discountenanced, and relief in equity been given against them, even so long since as the Lord *Coventry's* time, and long before: particularly in the case of *Arundell and Trevillian*, between whom an order was made in *February, 2 Car. I.* in these words, "Upon the hearing and debating of the matter this present day, in the presence of the counsel learned on both sides, for or touching the bond or bill of 100*l.* against which the plaintiff, by his bill, prayeth relief; it appeared, that the said bill was originally entered in to by the plaintiff unto the defendant for the payment of 100*l.* formerly promised unto the defendant by the plaintiff,

Arundell v.
Trevillian.
1 Chan. Rep.
87. et vide *Hall*
v. Potter Shower.
Parl. Ca. 76.

[* 175.]

* for the effecting of a marriage between the plaintiff and *Elizabeth* his now wife, which the said defendant procured accordingly, as his counsel alledged. *But this court, utterly disliking the consideration whereupon the said bill was given, the same being of dangerous consequence in precedent, upon reading three several precedents, wherein the court hath relieved others in like cases against bonds of that nature, thought not fit to give any countenance unto specialties entered into upon such contracts.* It is, therefore, ordered and decreed, that the said defendant should bring the said bill into court, to be delivered up to the plaintiff to be cancelled.

Show. Parl. Ca.
76.

And a decree; in favour of such a bond, was reversed in the house of Lords, in the case of *Hall* and others against *Potter*, reported in *Shower's Cases* in Parliament.

And the same principles that apply to contracts executed, as bonds or the like, extend likewise to assumpsits, and executory agreements. On which ground it is held, that all promises must have three qualities. First, they must be good and lawful. Secondly, they must

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must be possible. And thirdly, they * must be certain, [* 176.]
and of some signification, and not frivolous and nugatory.

First; wherever the consideration, which is the 1 Bulst. 38.
ground of the promise, or the promise, which is the
consequence or effect of the consideration, is unlawful,
the whole contract is void.

Thus, where the plaintiff declared, that, in consi- 3 Salk. 97.
deration he (the plaintiff) would discharge the defend-
ant from 22*l.* due from him to W. R. his master; he
(the defendant) promised to lay out 40*l.* in repairing
the plaintiff's barge: this was held a void promise,
and the consideration deemed illegal; for the plaintiff
could not discharge a debt due to his master.

And if a sheriff, for 10*l.* promise that a prisoner shall
escape, this promise is not good. 10 Co. 76, 102.
Dyer, 356.
Cro. Eliz. 199.

So, if one that is a minister of justice, promise to
do a thing that is unlawful in his office; or another
promise to save him harmless in so doing; such prom-
ise to save him harmless in so doing; such promises
are void. And, therefore, where A. had levied a plaint
* in the *Stepney* court against B. and a precept to attach [* 177.]
the goods of B. was directed to C. the bailiff. The
bailiff attached corn in shocks, and delivered them to
A. to re-deliver them at the next court, A. promising
to save him harmless. It was held, that no action lay
against A. for not saving C. harmless, *because the at-*
taching the corn shocks was unlawful.

So a promise, *as well as a contract*, not to use a trade
in a particular place is void, if it be without a consi-
deration; and if it be a promise, that has in view a ge-
neral restraint from using his trade, it is void, though
there be a consideration. Pragnell v.
Gosse. Allen 67.
Stile 11. 2 Bulst.
136.

And a promise to procure one to be instituted to a
chapel, in consideration of 20*l.* paid to him, being
simoniacal and against law, is void. Mackallen v.
Todderick,
3 Cro. 337, 353.

But, in cases where the unlawfulness of the consi-
deration against which a person is indemnified, is un-
known to that person, the promise, founded upon it,
will be binding. Therefore, if A. bring B. to a com-
mon inn, of which C. is the host, and affirm to C.
that Fletcher v.
Harcourt.
Hutt. 53.
Wynch 48.

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[* 178.] that he has * arrested B. by virtue of a commission of rebellion; and *in consideration that C. will keep B. as a prisoner by the space of one night*, A. assumes and promises to save C. harmless. If B. recover against C. in an action of false imprisonment, C. may have an action against A. For though the keeping B. is unlawful, it does not appear to C. to be so.

Arundel v.
Gardiner, 2 Cro.
652.

And, where a plaintiff pointed out particular goods, and desired the sheriff to take them on a *feri facias*; and, in consideration that the sheriff would take them, promised to indemnify him, this was held a good promise; for, the plaintiff shewing the goods, and requiring the sheriff to do execution, it was reasonable that he should save the sheriff harmless. And a promise to that purpose was held to be good.

Secondly; a promise must be possible to be performed.

Bendl. 59, 90,
139.

Therefore a promise to go to *Rome* in three days, is void. So is a promise, that a man in *London* shall cover a house in *Hampshire*, while he is there in *London*.

[* 179.]
Co. Litt. 206. b.
Perk. sec. 735.

* Upon this ground, if A. the 9th of *May*, promise to stand to the award of B. so that it be made before the 10th of *May* next, *and that A. have notice fifteen days before*, the promise is void.

So promises to be nonsuited, where there is no action; or to spare a piece of ground, where there is none such, are void.

1 Roll's Abr. 15.
Pl. 6.

But, where the matter promised may be reduced to a certainty, though it be upon a condition that is impossible, the promise will be good, and the condition only void. As if A. be indebted to B. in ten pounds, and C. promise B. that, in consideration that he will forbear suing A. for the debt till such a day, he (C.) will, if A. does not pay him upon that day, pay him *upon the same day*; this is a good promise, upon which B. may have an action against C. For although A. has the whole day to pay it, and then, it is impossible for C. to pay it upon that day, on default of A.'s not paying it upon the same day; yet, *the substance of the promise being for C. to pay, in default of A.'s paying*, and the time, limited for C. to pay, being an impossible time, the condition, as to the time, is

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* is void; and then, if A. omit to pay it at the day, [* 180.]
C. ought to pay it on request.

Thirdly. Promises we have said, must be certain. ^{1 Bullf. 92, 97.}
And therefore, if one promise to deliver goods, in con- ^{2 Cro. 250.}
sideration that the other promises to pay money in a
short time, this promise is said to be void, *for uncertain-*
ty as to the time: so, if A. promise to sell a horse to
B. for the price *that B. shall value him at*, such promise
would likewise be void.

But, where a man promises that he will pay a sum ^{10 Co. 75, 102.}
of money, and does not say when, it is a valid promise,
and the money must be paid presently.

So, if A. promise to deliver B. goods, or make him ^{10 Co. 77.}
a lease, or the like, and no time is fixed when it shall
be done, the promise is certain enough; but the party
has all his life-time to perform it in.

And if A. be about the business of B. and B. pro- ^{Het. 122.}
mise A. that he will repay him whatever he lays out;
this is sufficiently certain.

Again; if A. in consideration that B. will * marry [* 181.]
his daughter, promise to give with her a child's part; ^{Silvester's case,}
and that, at the time of his death, he will give to her ^{Popham, 148.}
as much as to any of his children, except his eldest
son, this is a good promise; for, though a child's part
is in itself altogether uncertain, yet, the promise being
to give *as much as to any* of his children; it is certain
enough, it being averred what the rest of the children
had except the eldest.

So it was held that, where A. in consideration that ^{Pointer v. Poin-}
B. would marry his daughter, assumed and promised ^{ter, Cro. Car.}
to give B. twenty *French* pieces, this was a good pro- ^{194.}
mise; for this, according to the usual speech at that
time, should, it was said, be intended *French* crowns,
which were the common coin of *France*, and known
here.

And if there be an assumpsit to enter into an obli- ^{1 Syderf. 270.}
gation for performance of a thing of certain value,
without mentioning in what sum, it shall be intended
according to the value.

So where, in an assumpsit, the plaintiff declared, ^{1 Keb. 56, 65.}
that

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[* 182.] that the defendant, in consideration, * &c. six months before the return of king *Charles* the second, assumed to pay 20*l.* to the plaintiff, if *Charles Stuart* should be king of *England* within twelve months thence next following: this was adjudged a good promise, and that it should be taken according to the subject matter, *viz.* That the king that was then out of possession, should be in possession within twelve months.

Pleas v. Palfry.

1 Syd. 270.

1 Keb. 776.

Hob. 69.

1 Brownl. 4.

1 Mod. 70.

But where the plaintiff declared that, whereas there was a communication between the plaintiff and defendant concerning the bark of certain wood, and that, thereupon, it was agreed, that the defendant should give to the plaintiff ten shillings *per* seam for all the bark of such wood as the plaintiff should cut; and that the defendant assumed and promised to have ready upon a certain day, articles purporting the agreement, and an obligation for performance thereof, &c. the declaration was held not to be good; because it was not said in what sum the obligation was to be, and a certain sum could not be intended, because the number of seams were altogether uncertain.

[* 183.] All contracts and agreements, the objects * of which militate against the principles of morality and public decorum: as is the case with all such as are entered into; to give effect to corrupt purposes; are by the law of *England*, void, upon two of the grounds before alluded to, namely, as being repugnant to the welfare of the state, and also against that maxim or rule of law, which prohibits every thing which is *contra bonos mores*. Therefore, all contracts that are entered into with a view to evade the law, being in their nature immoral, are essentially vicious, and cannot be supported.

Per Lord Mansfield, Cowper
39.

Therefore, if a person, who wanted to be made a bishop, conversing with a person who had *most interest* at court, upon the subject of a see that was *then* vacant, were to say, *I will bet you so much* (naming a considerable sum) that I have not the bishopric. Such a wagering contract, *though innocent in itself*, if unaccompanied with any sinister view, yet, *being a mere colour* to disguise the *real* intention of the party, namely, to purchase the bishopric, which is an illegal act, would be clearly and manifestly corrupt, and therefore void.

Upon

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* Upon the same principles a wager, entered into [* 184.]
merely as a colour to cover usury, cannot be recovered by Ibid. 40.
 action at law; for the moment the truth appears, the
 contract, whatever shape it may assume, will remain
 to be governed by the same rule, as if the parties had
expressly entered into the illicit and corrupt agree-
 ment itself.

And if a wager were made with one of the judges,
 or one of the lords who are to decide upon a cause;
 this operating as a bribe, would render the contract
 void.

And the same objection would apply to a wager, laid
 with a counsel or attorney on the adverse side, to in-
 duce him to act treacherously in the cause.

But a wager laid between the plaintiff and defen- Jones v. Ran-
 dant in a cause, "whether a decree of the court of dal, Cowper
 Chancery would be reversed or not on an appeal to the 37.
 house of Lords," the parties being upon equal terms,
 and the contract entered into without fraud, and with
 a view only of securing something to the appellant in
 case the decision went against him, was held to raise a
 valid contract; as not * being prohibited by any posi- [* 185.]
 tive law, nor against any principle of sound policy, or
 legal maxim.

All contracts that have a fraudulent object in view,
 are, *upon the same grounds*, void, both at law, and in
 equity.

Therefore where two sutlers to several regiments of Willis v. Bald-
 militia (who as such were entitled to certain forage of win, Dougl.
 oats and hay for divers horses daily out of the king's last edit. 450.
 magazine belonging to the camp) entered into an
 agreement with the person who furnished and supplied
 the magazine, that the sutlers would abstain from tak-
 ing the forage, or such part thereof, as they should
 think fit, and would leave the same to be the property
 of the person supplying them, and that he should pay
 and allow them $9\frac{1}{2}d$ by the ration, for every ration to
 which they should be entitled, and which they should
 so leave at the magazine: this was held to be a corrupt
 agreement between the parties, as having for its ob-
 ject the cheating of government, by taking a compo-
 sition for the forage of the whole number of horses al-
 lowed, *whether they were kept or not*, which was a clear
 fraud upon the public.

These

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[* 186.]

* These principles, likewise, extend to all contracts of an unfair nature in respect of their influence on third persons, although *otherwise* as between the parties to them; because, if their object be to impose on third persons, the parties to them cannot have remedy at law or in equity, for they are immoral.

Treatise of
Equity 24.

Therefore a bill in equity for an allowance of attendance at auctions, to enhance the price of goods, will be dismissed with costs; for equity will never give countenance to demands of such a nature.

Neither would such an agreement support an action at law.

The third head of exception, above alluded to, includes all contracts respecting things prohibited from being objects of contract by statute law.

Of this nature are all bonds given in opposition to the third branch of the statute of the 23 H. 6. cap. 10. made in avoidance of obligations taken in other manner than is expressed in that statute. Therefore if a sheriff let one, who is in his custody for suspicion of * felony, go at large upon his single obligation; this obligation is void.

37 H. 6. 1. b.

[* 187.]

10 Co. 100. b.

Bro. tit. Oblig.

37. Fitz. tit.

Oblig. 4.

7 E. 4. 5. Pl. 15.

Fitzh. Debt. 80.

Bro. non est

factum 14.

10. Co. 100. b.

So if one be in the custody of the sheriff by a *capias* upon an indictment for a trespass, and the sheriff let him to mainprize; and he enter into an obligation to a third person, upon condition to keep his day, &c. *and this be done for the surety of the sheriff*: This obligation is void; because the last branch of this statute prohibits any sheriff from taking an obligation for any cause *aforesaid*, or by colour of their office, but only to themselves; and then, inasmuch as it is taken to another, it is void.

Danby v. Heth-
cot, 10 Rep.
100. b. Vide
Cro. Eliz. 66.

And this statute extends as well to *promises* made under such circumstances, as to obligations. And therefore if a sheriff or gaoler, in consideration of the ease and enlargement of any person that is within his ward, take a promise to save himself harmless; such a promise (although the statute speaks only of an obligation with condition) being in equal mischief, is void; the words of the statute, *viz.* "And if the sheriff takes any obligation in any other form, that it shall be void,"
being

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being * sufficiently comprehensive to bring *such a promise* within the *equity* of it. [* 188.]

So every agreement, contract, and security for more than legal interest is void, by virtue of the statute of the 12 Ann. stat. 2. cap. 16.

Therefore where L. declared against the acceptor W. on a bill of exchange, as indorsees of A. and B. to whom the bill was stated to have been indorsed by C. the drawer and payee; and the defence was, that the bill was given upon an usurious contract between A.—B. and W. whereby more than legal interest was secured. It was insisted, in answer to this allegation, that the bill was indorsed to L. for a valuable consideration, and without notice of the supposed usury; and contended, that, although it should appear that the original transaction was usurious, still W. was answerable to them. But it was determined, that no action could be maintained on a note so circumstanced; for that the bill, in such case, was void at first; and, then, a contract, void in its origin, could not be rendered valid by any thing done to it afterwards.

Lowe, et al.
v. Waller,
1 Term Rep.
736.

* So an agreement by a *bankrupt*, or *any person* on his behalf, to pay a sum of money to a creditor for signing his certificate, is void under the 5 Geo. 2. c. 30, sec. 11. The following case illustrates this proposition in both instances.

[* 189.]

A. having committed an act of bankruptcy, B. his chief creditor, took out a commission against him; but, afterwards, finding that no dividend was likely to be made, refused to sign his certificate. Afterwards, on frequent application, and earnest entreating, made by the bankrupt to O. a tradesman in town (who was an intimate friend of B. who lived in *Cheshire*) he (the tradesman) got O. to write to B. several times, and he at last prevailed upon B. to send him (O.) a letter of attorney, empowering him to sign the certificate, which O. would not do, unless the bankrupt, or somebody for him, would advance 40*l.* and give a note for 20*l.* more, which sum and note on O's. signing the certificate for B. D. (who was the bankrupt's sister) paid and gave to O. accordingly, who, thereupon, gave a receipt for the money, promising to return it, if the certificate was not allowed by the chancellor. The certificate

Smith v. Brom-
ley, Dougl. stat
edit. 696. in
note.

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[* 190.] ficate was allowed, and * O. paid the money over to the creditor. And, on an action for money, had and received for D.'s use, it was contended on the part of B. that if D. had become security for her brother the bankrupt, before the act of bankruptcy, B. might have received the money of her without any imputation; and that, if a third person, afterwards, voluntarily paid what she might before have become bound for, without any injury to the bankrupt's other creditors, there was no iniquity in the creditor's taking the money, so as it did not amount to his whole debt. But Lord *Mansfield* was of a different opinion. His lordship said, that it was iniquitous and illegal in B. to take, and, *therefore*, it was so in him to detain this 40*l.* If a man made use of a means in his own power to extort money from one in distress, it was certainly illegal and oppressive; and, whether it was the bankrupt or his sister that paid the money, it was the same thing. The taking money for signing certificates, was either an oppression on the bankrupt or his family, or a fraud on his creditors. It was a thing *wrong in itself* before any provision was made against it by statute; for, if the bankrupt had conformed to all the law required of him, and had fairly given up his all, the

[* 191.] * creditor ought in justice to sign his certificate: but, on the other hand, if the bankrupt had been guilty of any fraud, or concealment, the creditor ought not to sign, for any consideration whatever. If any near relation was induced to pay the money for the bankrupt, it was taking an unfair advantage and torturing the compassion of the family: if it was the money of the bankrupt himself, it was giving one creditor his debt to the exclusion of the others, and a fraud upon them. His lordship, therefore, thought it necessary, for the better support and maintenance of the law, to allow the action; for no man would venture to take, if he knew he was liable to refund. Where there was no temptation to the contrary, men would always act right.

And agreements of this kind are void under the statute, although the money, stipulated to be paid, be for the benefit of *all* the creditors.

Thus where the plaintiffs, as assignees of a bankrupt, were entitled to the equity of redemption of 1490*l.* bank stock, which was in the mortgage to L. for securing a sum of money lent by him to the bankrupt, and the defendant was desirous that this equity of

Jones, et al.
assignees of
Gardiner v.
Barkley, Dougl.
last edit. 685.

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of * redemption should be assigned to L. by the plaintiffs, and that they should execute to L. a general release, of all claims and demands which they, as assignees, had upon him; an agreement was entered into between the assignees and the defendant, "That, on " the bankrupt's having his certificate confirmed by " the lord chancellor, and the assignees assigning to " L. or any person he should appoint, so far as in them " lay, the equity of redemption of the capital stock " mortgaged to L. and also executing to him a general release of all claims and demands, which they, " as assignees, had on him, the defendant should pay, " and promised to pay (four months after the certificate should be confirmed by the chancellor, and " on the plaintiffs assigning the equity of redemption, " as aforesaid, of the said stock to L. or any person " he should appoint, and executing and delivering " such general release) the sum of 611*l.* to the plaintiffs, for the benefit of the creditors of the bankrupt." The bankrupt's certificate was allowed and confirmed, and an assignment of the stock prepared and tendered to the defendant for execution. But the defendant refused to execute it, saying, that he acted only as attorney for L. who would never * pay the money.

[* 192.]

It was proved on the trial, that C. (who was one of the plaintiffs, and was a most obstinate creditor, and by much the largest) was persuaded to sign, by being told, that, if he did not, the money would never be received. It was therefore objected, that this was an agreement to secure the payment of money due from the bankrupt, in order to induce a creditor to sign his certificate, and, therefore, void under 5 Geo. 2. c. 30. sec. 11. A verdict was given for the plaintiffs, with 611*l.* damages, but subject to the opinion of the court on a motion for a nonsuit. It was contended on behalf of the plaintiffs, that this agreement was not within the sense or intent of the statute. The object of that act, it was said, like that of all other bankrupt laws, was to procure an equal distribution of the bankrupt's effects among all his creditors; that this general object ought to be kept in view in construing them all; and that the agreement in this case, tended to secure an equal distribution, and, therefore, promoted the policy of the statutes. *Sed per Lord Mansfield.* It struck me, in this case, at *Guildhall*, that the agreement was with the assignees acting for all the creditors, and the benefit to go to all the creditors. I

[* 193.]

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[* 194] thought * that, between a friend of the bankrupt and all the creditors, any agreement might be made; they might agree to supersede the commission; they might agree to compound. But upon fuller consideration I am satisfied; and the court is of opinion, that this case is within the letter of 3 Geo. 2. c. 30 and within the reason of it. Great corruption and oppression might arise from a combination of all the creditors, to exact conditions for signing the certificate.

Lewis v. Chafe,
1 P. Will. 620.

But Lord *Parker* refused to extend this statute by construction to a case, which *prima facie*, seems to be within the spirit, although it clearly is not within the letter of the act. In the instance alluded to, a bankrupt endeavoured to be discharged with the consent of four-fifths of his creditors in number and value, and a creditor preferred his petition to the lord chancellor against the allowance of the certificate, upon which the bankrupt, in consideration of the creditor's withdrawing his petition, gave him a bond for his whole debt. And Lord *Parker* was of opinion, that this was a case out of the words of the statute; for here the object was, to withdraw a petition against the allowance of the certificate, and * not to induce the creditor to sign the certificate, which was the mischief the statute was pointed at: and his lordship dismissed a bill to be relieved from the bond with costs.

[* 195.]

Again, all contracts for insuring lottery tickets are made void by the 14 Geo. 3. cap. 76.

Secondly, a contract is unlawful, in a proper sense, if the object of it be, *to induce the omission of something, the doing of which is a duty in the person with whom it is made.*

Norton v. Simes, Hob. 12.
S. C. More 856.

As if a sheriff make an under-sheriff, *provided that he shall not serve executions above twenty pounds, without his special warrant*; this proviso or agreement will be void; for, though a sheriff may chuse not to make an under-sheriff at all, or may make him at his will, and so remove him, yet he cannot leave him an under-sheriff and yet abridge his power.

Ibid.

And in such cases the law is the same, whether the contract be contained in a covenant or in a bond; therefore, on its being argued in the last-mentioned case, that the restraint of executions above twenty pounds

grew

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grew not * on the part of the sheriff, but on the part of the under-sheriff by his covenant, which might stand good, notwithstanding the repugnancy of his office; it was answered, *that such a covenant was void as against law and justice*: for since, by being made under-sheriff, he was liable by law to execute all process, he could not, any more than the sheriff himself, covenant not to execute process without another's special warrant: for *that* would be to deny or delay justice. [* 196.]

Thirdly, a contract or agreement is unlawful, in the proper sense, *if it be to encourage unlawful acts or omissions*.

Therefore, if the proprietors of a newspaper were to give the editor a bond of indemnity against any indictment or action, to which he might, thereafter, be subjected by reason of publishing libels, or the like; such bond would be void.

So if one enter into an obligation to the sheriff to bear him harmless if he embezzle a writ. If the sheriff do so, and be damaged by the embezzling, yet he shall not take advantage of the obligation; for it is void, because * he shall not be protected in doing an act contrary to law. Fitzh. tit. Oblig. 13. [* 197.]

Again, if one apply to a gaoler, and make him a promise grounded upon this consideration; namely, that, in consideration that he will suffer one charged in execution for debt to go at large, &c. the debt not being satisfied, he shall be paid such a sum of money. This consideration is against law, and, consequently, the promise, founded upon it, is void by the common law, and gives no cause of action. Beathan v. Martin, 2 Bulst. 213.

And if the sheriff let one to mainprize who is not available, and take an obligation, it will be void by the course of the common law; for, in such case, the letting him go at large is a *tort*, and a thing *contrary* to law, and, then, the obligation is made to aid the sheriff in doing a *tort*, in which case it is void. M. 37 H. 6. 1 b. Fitz. Oblig. 4. Bro. tit. Oblig. 37. 1 Lev. 209. 10 Rep. 100. b. Dyer 324.

So if a man will take a bond, or other security, to save harmless of suffering one to escape; or for enlarging one out of prison against law; or to save one harmless if he kill such an one, or do such a trespass: Dive vers. Maningham, Plowd. 60, 64. Et vid. Dyer 118, 119.

H 2

These 2 H. 4. fol 9 Cro. Car. 353, 354.

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[* 198.] These * contracts, upon the same principle, will be void.

M. 2 H. 4. 9.

Again, where the plaintiff in replevin had a *withernam* out of the common pleas, by force whereof one of the sheriff's bailiffs took four oxen of the defendant's in the name of *withernam*, and afterwards delivered them to the defendant again, and the defendant became bound to him to keep him without damage concerning these oxen: the obligation was held to be void; for the writ of *withernam* was, *capias in withernam*, &c. *et ea detineas quo usque*, &c. So that the sheriff ought to have kept the cattle, and not to have delivered them to the party; and then the delivering them to the party was a tort, and the obligation was made to aid him in that tort, and, therefore, void.

Upon the same principle, namely, *that the contract has a tendency to encourage unlawful acts*, a wager between two people, that one of them, or that a third person, shall do a criminal act, will be void.

[* 199.]

Thus, if I lay you a wager that you do not beat such a person, and you lay that you * will, such a wager will be void; *because it is an incitement to a breach of the peace*.

So, if the subject matter of a wager were a violation of chastity, or an immoral action, "*as if one betted that he would seduce such a woman*," courts of justice would entertain no action upon such a wager; because it is an incitement to immorality.

But there is a distinction where a bond is to secure the obligee against a breach of covenants in an indenture, some of which covenants are void, and some of which are good, where the covenants are void at common law, and where by the statute law; for, in the former case, the bond will be good for the covenants that are lawful, and void as to the other covenants; but, in the latter case, the whole bond will be void.

Norton v.
Simes *supra*.
Hob. 12, 13.
Bro. tit. faits.
37. Moore 856.
Plowd. 63.

Thus, in the before-mentioned case of *Norton* against *Simes*, though the covenant from the under-sheriff, as to not serving executions above twenty pounds without the special warrant of the sheriff, was void; yet, the covenant that the under-sheriff should discharge and save harmless the sheriff, of all escapes of prisoners

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* prisoners, that should be arrested by him, or any bailiff or officers appointed by him, was held to be good, and the bond as to that valid; it being lawful for the sheriff to take bond of the under-sheriff, to discharge and save him harmless of escapes upon arrests made by himself: for, since the sheriff transfers his authority unto the under-sheriff, it is reasonable that the former should take security of the latter, to perform all the duties justly and faithfully to himself and others. But if a sheriff take a bond for a matter against the spirit of the 23 Hen. 6. c. 10. and also for a debt due, the whole bond is void. The reason for which distinction is, *that such is the letter of the statute*: for a statute must be strictly pursued; but the common law distinguishes according to common reason, and, having made that void, which is against law, permits the rest to stand. [* 200.]

And here it is necessary to observe, that, although contracts or agreements, respecting things *which the law prohibits to be the subjects of contracts*, create no right, and, consequently, occasion no obligation on either side, yet the law *suffers* them, in some instances, nevertheless, *after they have been carried into * execution*, [* 201.] to prevail contrary to its prohibition; for, *being executed*, they are valid between the parties, *although the law will not give its aid to assist either party in carrying them into execution*. For the parties are looked upon to treat together as if there were no law about the matter, and so to renounce the benefits which might accrue by the law to either of them. And therefore, though they do ill to engage themselves, they ought in conscience to suffer their engagement, *being executed*, to continue in force, and neither of them ought to break it without the assent of the other. As for example; if I game with a man contrary to the law, and lose, I ought not to have recourse to law to recover my money, nor use any forcible way to regain it, if there be no cheat put upon me by him that has won it.

In this view of the matter, prohibitions, enacted by positive law in *England*, in respect of contracts, are of two sorts. First, such as are founded upon general reasons of policy, and public expedience. As, where the act is in itself immoral, or a violation of the general laws of public policy. Secondly, such prohibitions as are intended to protect weak or necessitous men

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[* 202.] men from being over-reached, * defrauded, or oppressed. In the former cases, both parties offending are equally guilty; in the latter, only one of them. The law, therefore, in the former cases, allows no action for the relief of the party who has performed his part of the contract, after he has assented *with full and entire liberty*: the law of *England*, in this case, corresponding with the maxim of the *Roman* law, "That if an agreement be dishonest, both in respect to him that gives, and him who receives, the first cannot require any thing again, because in this case the possessor has the advantage." Therefore, if one pay money fairly lost at play, and do not sue for the recovery of it within the time prescribed by the statute of Anne, c. 14. he is barred.

Vide Digest. lib. 12. tit. 5. de conditione ob. turb. & injust. causam leg. 8. 2 Burr. 1012. Ca. T. Talbot. 41.

So if a man, in cases of bribery, pay money by way of a bribe, he cannot recover it in an action; because, both plaintiff and defendant are equally criminal. The prohibition in the lottery act, stat. 12 Geo. 2. cap. 63. falls within this distinction.

Vide Browning v. Morris, Cowper 790.

[* 203.]

Upon the same principle no action lies for a lottery office-keeper for money paid by him to a person, in consequence of his having * insured a ticket; this species of contract being prohibited by the 17 Geo. 3. cap. 46: for the money being conscientiously due in honour and honesty, and paid, it cannot be recovered back; both parties are in *pari delicto*.

Lowry v. Bourdieu, Doug. last edit. 468.

Money paid upon a gaming policy is in the same predicament. It cannot be recovered back.

Thus, where L. had lent 2600*l.* to H. on a common bond, and, while he was at *China*, got a policy of insurance underwritten by B. and others. which was on the following terms: "At and from *China* to *London*, beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton* in *China*, &c. upon the said ship, &c. from and immediately following her arrival at *Canton* in *China*, valued at 26,000*l.* being the amount of H.'s common bond, payable to the parties as shall be described on the back of this policy, and it bears date the 6th day of *December* 1775; and in case of loss, no other proof of interest to be required than the exhibition of the said bond; warranted free from average, and without benefit of salvage to the insurer." At the head of the insurance

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* surance was written, "*on a bond as above expressed.*" [* 204.]
H. returned from *China*, and arrived safe, none of the events insured having happened. Afterwards the insured brought an action for the return of the premium, on the ground, that the policy *being without interest*, the contract was void. But it was held by three judges against one, that the policy was a gaming policy prohibited by the statute of 19 Geo. 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis*, was applicable to the case, and the plaintiffs, the risk being run and over, could not recover the premium.

But in the latter cases, namely, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not *in pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished, may bring his action, and defeat the contract. For instance; by the statutes of usury, taking more than 5 *per cent.* being * declared illegal and the contract void, the borrower, if he pays the illegal interest, may recover the excess of interest on an action: for these statutes were made, to protect needy and necessitous persons from the oppression of usurers and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are ready to come into any terms, and with their eyes open not only break the law, but complete their own ruin.

Another instance of this kind is the beforementioned clause in the stat. 5 Geo. 2. cap. 24. sect. 17. to prevent bad practices on bankrupts, who have not obtained their certificates, and who, for the sake of obtaining it, will come into any terms themselves, and cause their friends to come into any terms, that a hard creditor may chuse to impose. Now, on this statute, if the bankrupt, or a relation, pay money to a creditor, who, in consequence signs the certificate, and then the bankrupt renews his trade, and receives every advantage that he can derive from having obtained his certificate: he may, notwithstanding, bring his action, and

Vide *Browning v. Morris*, Cowper 791.

Bosanquet v. Dashwood, Cal. T. Talbot 38. [* 205.]

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[* 206.] and * recover the money back ; and this, though he has acted contrary to a law made for his own benefit : for, in these cases, the one party is urged by mere necessity to pay what the other ought not in justice to demand ; therefore the maxim of *volenti non fit injuria*, does not apply to him ; and then, he falls within the reason of the law, that, in order to prevent oppression and advantage from being taken of the necessity of others, has made it penal for him to take.

But, if such illegal contract remain in an executory state, and be not executed ; there, if the party who has paid money as a consideration for something illegal to be done, wishes to rescind the contract, he may do so, for, so long as nothing is done by either party, each of them is free to recant ; because it is to be presumed, that they have not acted with mature deliberation. As if a merchant has promised another to furnish him with contraband goods, and they agree for the price, either may refuse to stand to this bargain, which ought not to have been made. But then it can only be done on the terms of restoring the party to his original situation.

[* 207.]
Walker v.
Chapman,
cited Dougl.
last edit. 471.

Supra.

* Thus, where a sum of money had been paid in order to procure a place in the customs, and the place had not been procured ; the party, who had paid the money, brought his action to recover it back, and it was held that he should recover ; because the contract remained executory. So, if the insured, in the before-mentioned case of *Lowry and Bourdieu*, had brought his action before the risk had been over, and the voyage finished, they might have had a ground for their demand ; but they waited till the risk (such as it was, not indeed founded in law, but resting on the honor of the insurer) had been completely run.

And in some cases the illicit nature of the subject renders the contract void, and in others it invalidates only the security. This distinction seems to have originated on the manner of wording the statutes against gaming, as applied to money lost, and money lent at the time and place of play.

Note. The statute 9 Ann. c. 14. makes the winning above 10l. at one sitting a nullity.

The statute of 16 C. 2. c. 7. f. 3. enacts, as to money, exceeding 100l. lost, and not paid down at the time of losing it ; “ that the loser shall not be compellable

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able to make it*good, but the CONTRACT and CONTRACTS *for the same* and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, shall be utterly void, &c." But the words CONTRACT and CONTRACTS *for the same*, seem to have been industriously avoided in the statute of the 9th Anne, c. 14. the words of that statute being, "that all notes, bonds, bills, judgments, mortgages, or other securities, &c. for money won or lent at play, shall be utterly void. [* 208.]

This difference in the wording of these statutes, and the cases decided thereupon, was held by the court of King's Bench, in the case of *Robinson and Bland*, to warrant that court in determining, that, although, by these statutes, as well a contract for money lost at gaming, as the security given for such money was void, and, consequently, no action could be maintained for it; yet, that, as to money fairly lent at play the securities only were void, the contract remaining valid; the genuine, true, and sound construction of the 9th of Anne being "to understand it as intended to prevent *any securities being taken for money won at play, or lent to play with, when the borrower has lost all his ready cash; but not to make the contract itself void, where the money is fairly and *bona fide* lent, though at the time and place of play." And, accordingly, it was held, that *an action upon the case on assumption* on the implied contract, lay to recover money lent by the plaintiff at the time and place of play, and for which a bill of exchange was then given, *the bill itself being a void security*. [* 209.]

*Robinson
v. Bland,
2 Burr. 1077.*

The annuity Act appears to me, upon a full consideration of its several clauses, to furnish ample grounds for a similar construction. And, indeed, if the province of courts be to *expound* not to make the law, I cannot see any principle upon which this statute can be construed otherwise. For every section, except that which relates to the purchasing annuities from infants, expressly confines itself to the security *without meddling with the contract*. *Ex gratia*, The first clause requires, that "a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall from thenceforth be granted for one or more life or lives, &c. shall, within twenty days of the execution

17 Geo. 3. c. 26.

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[* 210.] *execution of such deed * bond, instrument, or other assurance, be inrolled in the high court of Chancery; and that every such memorial shall contain the day of the month and the year when the deed, bond instrument, or other assurance bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses, and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same; otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes."* And in the third section it enacts, "That in every deed, instrument, or other assurance, whereby any annuity or rent-charge shall thereafter be granted, or attempted to be granted, the consideration *really* and *bona fide* (which shall be in money only) and also the name or names of the person or persons by whom, and on whose behalf, the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth in words at length; and in case the same shall not be fully and truly set forth and described, every such, deed, instrument or other assurance, shall be null and void to all intents and * purposes." The fourth section provides, "That if any part of the consideration be returned to the person advancing the same, or in case consideration, or any part of it, is paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or if the consideration or any part of it, is paid in goods; or if any part of the consideration is retained on pretence of answering the future payments of the annuity, or any other pretence; in all and every of the aforesaid cases, it shall and may be lawful for the person, by whom the annuity or rent-charge is made payable to apply to the court, in which any action is brought for payment of the annuity *on judgment entered*, by motion to stay proceedings on the judgment or action; and if it shall appear to the court, that such practices as aforesaid, or any of them, have been sued, it shall and may be lawful for the court to order the deed, bond, instrument, or other assurance to be cancelled, and the judgment, if any has been entered, to be vacated."

[* 211.]

In each of the foregoing clauses of the statute it is observable,

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observable, that the attention of* the legislature is [* 212.]
closely confined to the *deed, bond, instrument, or other*
assurance, without any allusion whatever to the con-
 tract itself.

But in the sixth clause of the statute the phraseology is altered, the *securities* are no longer adverted to, but the legislature enacts, "that all **CONTRACTS** for the *purchase* of any annuity with any person being under twenty-one years, shall *be* and *remain* utterly void, any attempt to confirm the same, after such person shall have attained the age of twenty-one years notwithstanding." And then it proceeds to make any transactions with infants respecting annuities penal.

Now we have seen that the ground on which courts of law, in the construction of the statutes against gaming, have held that there is a clear distinction between the contract and the security, is the different manner of wording the statutes as applied to money lost and money lent at play. Surely that argument applies with equal, nay with greater force to the Annuity Act, the *clauses* in which act are, as we have seen, differently worded and therefore require a different exposition. The statutes in both cases; namely, those against *gaming, and that respecting the purchase of annuities; begin with a preamble alluding to the mischiefs that arise from the practices meant to be regulated. In both cases the laws are highly remedial and penal. They respectively provide for different mischiefs, arising from similar causes, according to the degree in which they affect society. The legislature foresaw that there was little reason to apprehend any danger from third persons advancing money to those who are at play, when any security taken for it would be void under the statute. But nothing less than annihilating the contract promised to be a restraint on the warmth, zeal, and passion of the parties *actually* engaged. The legislature, thereof, suited the remedy to the urgency of each case. The same train of reasoning applies to annuities. The purchaser, when he reflects that unless the requisitions of the statute are complied with, his securities will be void, will not easily be induced to dispense with those forms. The seller, likewise, will not find it worth his while to pay for such a risk. The case will therefore rarely, if ever, occur but from oversight in the solicitor. The mischiefs, therefore, arising to adult persons are not much to be apprehended, the

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- [* 214.] the * remedy that will result from cancelling the securities is adequate to the mischief. But the case is otherwise as to annuity contracts with infants. All dealing on contract with them is mere gambling. It must therefore be upon terms the most extortionate, or the risk cannot be paid for. Depending upon honor only, the passions and feelings of the man are engaged, and in the unguarded moments of youth such contracts would generally be confirmed. To the contract, therefore, the legislature points the remedy, and, to place such contracts in as critical a state as possible, the legislature has not only declared them void, but also put it out of the power even of the parties themselves, at any subsequent time, to give them stability; since, to be equal, they must be founded on terms destructive to one of the parties, which is a mode of dealing universally prevented in all well regulated societies. If these observations apply, the distinction taken on the laws against gaming, between vacating the securities and annulling the contract, according to the degree of mischief incident to the transaction, is equally applicable to the cases of annuities; and the terms in which
- [* 215.] the legislature has provided the remedy not only warrants, but, for the sake of analogy in * legal proceedings, *requires* that it should be taken. And, if so, it appears to me, that, whatever be the nature of the neglect of the circumstances imposed by the statute, or whatever be the nature of the misfeasance (if it be not that of treating with persons under years of discretion) it will only affect the security, leaving the contract valid, and, if capable of proof without the production of the securities, capable also of being enforced by a suitable action.

Shove v. Webb,
1 Term Rep.
732.

I should here observe, that the opinion of the court of King's Bench, in the case of *Shove* and *Webb*, confirms, in express terms, these principles, although the inference, drawn from them therein, seems to me, to militate totally against the conclusion they necessarily furnished in that case. The facts were as follow: A. had granted an annuity secured by bond and judgment, and an assignment of half pay as an ensign in the army by way of collateral security for the payment of it. These instruments had been set aside in the court of Common Pleas, because part of the consideration, for which the annuity had been granted, was money due from the grantor to the grantee for goods previously sold

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fold by the grantee * to the annuitant, *which fact was not specified in the memorial as registered* (the memorial stating the whole consideration as paid in money). The residue of the consideration was paid in cash, at the time of granting the annuity. Upon the securities being set aside, the purchaser, to recover the consideration paid for the annuity, brought an action of assumpsit for goods sold and delivered; money paid, laid out, and expended; money had and received, &c.; and had a verdict for the whole sum, as well the value of the goods, as the money paid as the consideration of the annuity; but subject to the opinion of the court on the question, whether the legislature meant to make it illegal to *contract* for the sale of an annuity for any other consideration than that of money. And whether if any part of the consideration was for goods delivered, it so far tainted the transaction, that, if the security were set aside, no right of action could ever arise as for goods sold? and *Asphurst*, Justice, delivered the opinion of the court, "That the goods, in this case, being really and *bona fide* sold, the *contract* was STRICTLY legal, and not within the mischiefs intended to be remedied by the act; although the SECURITIES were properly *set aside* and *vacated*, by reason * of the consideration not being truly stated." But the conclusion drawn from these premises seems to me to be erroneous; for the judge proceeds thus: "And taking that to be the case, when the security was vacated, the original contract revived (i. e. the contract for sale of the goods)." [* 216.]

Now how the vacating the securities could revive the original contract for goods sold and delivered, &c. when the contract, by which the debt due for them was made part of the consideration for the purchase of the annuity, was declared "to be a *contract* STRICTLY legal, and not within the mischief intended to be remedied by the act," to me is inexplicable, unless it can be shewn that the contract and the securities are convertible terms; which position the court itself denies in this very judgment, by cautiously distinguishing between the *contract* and the *securities*, holding the *former* strictly legal, the *latter* clearly void. [* 217.]

Perhaps it may be contended, that, in these cases, the rendering the securities void, renders the contract so eventually; upon the ground that the parol contract is

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[* 218.] is determined by being * put into writing under seal. And then, that the writings being void for the reasons above-mentioned, the contract will be virtually so. Though it appears to me, that the question now in discussion may be determined in favour of the argument, that the original annuity contract by parol is subsisting, notwithstanding the proposition put by way of argument were true, on another ground equally clear and decisive, which will hereafter be mentioned; yet, as, should the ground alluded to fail, then the truth or falsehood of this proposition will become material, I shall investigate the principle of it here, and shew that it will not hold, if applied to a case, where there is a parol agreement, originally valid in law, and subsisting independent of the written securities: for it is perfectly clear, that the mere fact of putting a verbal contract or agreement into writing under seal does not determine it, or render it void, but, on the contrary, leaves the party, interested therein, at liberty to pursue his remedy to enforce performance, either on the parol contract or the written instrument at his election. — This proposition will be best illustrated by an example. A. instituted a plea of debt against * B. for 10*l.* before the mayor of *London*, and declared upon contract for goods sold, the value of which amounted to that sum. B. waged his law; to which A. replied, that, according to the custom of *London*, if the plaintiff could shew a paper or parchment, written and under seal of the defendant, which proved the contract, the defendant would be ousted of his law. And he shewed a writing, under seal of the defendant, to that effect, and prayed that the defendant should be ousted of his law. And it was contended that the plaintiff should be barred, for that he ought to have brought his action upon the writing, and not upon the contract. But *Prifot* was of a contrary opinion, for he said that the contract was not the worse because of the writing, and he compared it to the case of one bailing goods by deed indented, who might afterwards bring a writ of detinue for them without counting upon the indenture, because it was only a writing proving the bailment. And he said the law was the same if a man made a contract by deed indented; for, there, he was not obliged to count upon the deed indented, for that the contract did not determine upon the deed indented, but

[* 219.]
M. 39 H.6. 34
Bro. tit. Def.
Pl. 68.

27 H. 8. 22.
2 H. 6. 9. Pl. 5.

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but the party might elect how he * would bring his action (to which position all the justices agreed). So, he said, in the case put, the contract was not determined by the indenture under seal, which was an evidence of the contract, &c. And, therefore, that the action would lie notwithstanding that objection. [* 220.]

It may, perhaps, be objected, that the last-mentioned opinion arose upon a question put to the justices by the recorder of *London* (as was the custom in those days) and is, therefore, not to be esteemed a judicial decision of it, but the same point has been repeatedly brought before the court. As the subject which induces the citation is important, I shall mention one other case.

An Abbot and his predecessors, had used time out of mind to find a chaplain to a church belonging to another man. Afterwards, by deed indented, reciting that, whereas a dispute had arisen between them respecting this matter, &c. and for that the Abbot had used, &c. *ut supra*, the Abbot and the convent covenanted and granted that they would find a priest, &c. Hil. 21 H. 7. 5
Pl. 2. Bro. tit.
Grant 57. Ibid.
tit. Prescrip. 35.
Et vid. 1 H. 6.
8. 2 H. 6. 9.

And an action was brought for * a non-feazance, in which the plaintiff, in his count, made title by prescription. Hereupon it was contended by the defendant's counsel, that the action did not lie, because the prescription was determined by the deed indented. But it was held by *Frowicke*, Chief Justice, and *Fisher*, *Vavisor*, and *Buller*, Justices, that the prescription remained, and the action well lay; for the deed was in affirmation of the prescription, and of the same thing, and not contrary to it, and the deed recited the prescription, so that the intent of the deed was to support the prescription, and not to take it way. [* 221.]

To apply these cases (which, though of an ancient date, yet, if applicable, must be considered as undoubted authority, unless later decisions in subversion of them, or of the principle contained therein can be produced) to the question under our consideration. If the construction of the Annuity Act herein contended for, *viz.* that it applies, in the cases alluded to, to the securities, not to the contract, be the right construction (and it appears to me, that every argument which supported that construction of the Gaming Act, applies

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- [* 222.] plies * with greater force to the Annuity act) the consequence of making void the security will be only to make the deeds a nullity, and to leave the original contract, which subsists independent of them, and which they were intended to enforce in full effect between the parties. For instance, to apply our arguments to the case of *Shove* and *Webb*. The security there was by a bond and judgment, with a charge upon half pay by way of collateral security. In such a case, the bond recites a contract before subsisting, and is conditioned for the performance of it. The deed, making the charge, is upon the same plan; that also recites the contract and the bond, and imports to be intended for further securing the performance of it. So that all the securities recite, corroborate, and confirm the original annuity contract, as a contract subsisting and independent of either of them. Upon this head, *Frovick*, Chief Just. in the case before cited, *Hil. 21 H. 7. fol. 6. a.* puts an instance expressly in point; for he says, that it had been adjudged in that reign, where one had an annuity by prescription, and also a grant by deed that the grantor would pay it, and that, for default of payment, the grantee * should distrain; the annuity should nevertheless continue, *i. e.* that the rentcharge, granted by deed, should not determine the personal charge by prescription, but the one should be considered as an additional security for the other.
- [* 223.]

But perhaps it may be said, that the case of *Shove* and *Webb* is distinguishable from those here cited to illustrate the principle, "that the putting a verbal contract or agreement into writing, does not determine or render it void," upon the ground that the grantor in this case entered into a bond, and, thereby, determined the original contract by parol: which is a ground of distinction taken by *Priest*, *arguendo* in the case before cited, *M. 39 H. 6.* But the answer is obvious, and applies equally to all the securities taken and not registered. The statute enacts, "that the deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes." And no one would be heard, who should contend that a deed, bond, instrument, or assurance, *ipso facto* null and void to all intents and purposes, can be effective to the purpose

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pose of determining a contract * independently and [* 224.]
previously subsisting. If this reasoning be just, the
consequence of cancelling the securities in the princi-
pal case was, not to revive the original contract for the
hosiery, but to revive the original parol contract for the
annuity, which remained in suspense until the bond
should become valid by the consideration being register-
ed, or be cancelled pursuant to the act.

But should it be adjudged that a bond, so predica-
mented, that is an *essentially null and void bond*, deter-
mined the original annuity contract, the effect of such
a decision could only be, to take such a case out of the
principle of construction here attempted to be sup-
ported, leaving all cases in which there is no bond
given, to depend upon the principles which have been
stated and supported upon unquestionable authority.

Indeed, instances may be put, in which the con-
tract is so dependent upon the security, that the can-
celling the latter will render the former unattainable.
This will happen, for instance, in all cases, where the
annuity is granted to issue out of land only, and the
* grantee is restricted from charging the person of the
grantor: for in that case (the statute of frauds having
declared, that contracts respecting lands shall be in
writing) if the writing be cancelled, the contract,
which cannot be made out except by the security, will
become inoperative. [* 225.]

Then, if there be a distinction between the case of
an annuity chargeable upon the person of the grantor,
and an annuity charged upon his estate without refe-
rence to the person, as to the validity of the contract
independent of the securities; the question will be,
what shall be the situation of the parties in the latter
case, in which the proof of the contract falls to the
ground, with the securities which uphold it. And in
order to decide this question, we must advert to what
was the object of the legislature in this act of parli-
ament. The end of this law, in rendering void *secu-*
rities made under *circumstances* prohibited by the statute,
is not only to avoid what has been done, but to prevent
the thing prohibited, by throwing difficulties in the
way of the purchaser. With this view it strips him of

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[* 226.] the benefit of any security * which he has gotten, if the circumstances of the transaction be not conformable to the requisitions of the statute. But it applies the remedy to the securities which are to be cancelled, leaving the offender to make out his contract as he can. Notwithstanding the interposition of the statute, the contract still remains a sale of an annuity in substance. If the purchaser fail in making it out, he has to thank himself for it. It is his own neglect. It does not therefore follow, even in this case, that because the contract is incapable of proof, the purchase money shall be recoverable upon an assumpsit, on the ground that the cause or consideration upon which the money was paid has failed, for that is not the case. The consideration subsists, although the security be cancelled upon application to a court authorized to vacate it. The contract, in the eye of the law, continues, although there be a defect in the proof of it, by reason of the statute of frauds interfering and preventing parol evidence of it.

If the law, by an implied assumpsit, gave the grantee a remedy for his principal, the statute would be of little effect in either case. [* 227.] * Men would be very indifferent whether they complied with the requisitions of the statute, if the only consequence of neglecting them were the setting aside the annuity, the annuitant being left debtor for the money advanced. This would make the statute *felo de se*; for it is seldom that those, whose necessities drive them to contract upon such exorbitant terms, are in a condition to restore the money they have received. The embarrassment meant to be thrown upon the grantee, would, if that were required, fall upon the grantor. Perhaps it may be said, that this would tend to deprive the grantee of both his principal and his annuity, which will be more than an adequate punishment for the neglect of the requisitions of the statute. It may be so; but the legislature have done this, not directly, but consequentially. If the contract can be made out without the securities, the law does not deny the parties the benefit of it. But since it is executed in a manner that the law does not approve, it will not help the parties, but leaves them in the state it finds them in, denying the contractor its protection, which he has not deserved.

Indeed

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Indeed, in the case of *Shove* and *Webb*, a * distinction [* 228.] is attempted between an annuity, defective by a neglect as to the register of the consideration, and an annuity, defective by reason of the consideration being of a nature the statute prohibits; and it is said, that the latter case is in the teeth of the statute; from whence we are to infer, that the former is not so. But the statute makes no such distinction. It declares in the 1st clause, that the memorial shall set forth the consideration or considerations, otherwise the deed, bond, instrument, or assurance, shall be null and void. And in the 4th clause it enacts, "that if any part of the consideration shall be returned to the person advancing the same, or in case the consideration, or any part of it is paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if the consideration, or any part of it, is paid in goods, &c. in all and every of the aforesaid cases, it shall and may be lawful for the person by whom the annuity or rentcharge is made payable, to apply to the court, &c. by motion, to stay proceedings on the judgment or action; and, if it shall appear to the court that such practices, or any of them, * have been used, it shall and may be lawful for the court to order the deed, bond, instrument, or other assurance to be cancelled, and the judgment, if any has been entered, to be vacated." The statute, in both instances, applies to the securities, and, in effect, enforces the same consequence. It furnishes no ground from whence to infer, that the legislature intended to make the one case more penal than the other. [* 229.]

That a contract should fail of effect for want of the party, claiming a benefit by it, being capable to substantiate it by legal evidence, is not unusual. If a man lend another money, without taking a security for it, or calling in evidence to witness the transaction, and the borrower prove dishonest, the lender has no remedy either at law or in equity. If a man take a bond, and there be no witnesses to the execution of it, he will be incapable of recovering thereupon for want of proof of a delivery. Yet, in such case, he can have no relief either at law or in equity. This statute then, in respect of the neglect or malfeasance of the vendee, puts him in the same situation as he would have been, had he taken no security, but rested on a parol contract.

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[* 230.] * tract. If he has any evidence competent to prove the contract, he may recover thereupon. If he is deficient in respect of such evidence, it is his own fault. But the payment of the money being upon the foot of the contract, which contract the law leaves untouched, it seems a necessary consequence that no new contract can be inferred repugnant to the original contract, which *an implied assumpsit to restore the consideration* would be.

The construction here contended for, agrees with the words of the act, is consonant to that put upon a similar legislative interposition against gaming, and will effectually prevent the practices meant to be prohibited; for as no man will lend money on such a parol contract, so neither will he place himself in a situation which will expose him to the same consequences as if he had done so. But if the construction of the statutes be that the contract is void, and, consequently, that the money paid upon it may be recovered on an implied assumpsit (which, if the case of *Shove* and *Webb* is rightly determined, must be the case in all the instances provided against by the statute, that not having made * the shade of a distinction between them, except by making the securities absolutely void for a fault in the enrolment, but voidable only in the other instances) a man may safely adventure any of the things prohibited by the act; as the worst that can happen to him is, to have the securities set aside, and his money returned, which, if he has received any part of his annuity, will have lain at that interest.

Vide 21 H. 7.
20.

* or
A If the subject of a contract or agreement be self evidently useless, as tending to no consequence when put in execution, this will render the contract or agreement void. And the motive to consider it so will be still stronger, if it be of such a nature as, if not performed, it brings no loss or prejudice to the party stipulating it, and if fulfilled, will create trouble or damage to the performer; because, engagements of this kind produce no obligation: for how can a man have a right of requiring me to put myself to any charges, or any toil, in doing a thing which shall profit him nothing? and it is, indeed, against reason to undertake an action which can produce no good, and may produce evil. This seems to be one strong ground

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* ground for the distinction between a contract to restrain a man from trading generally, and a contract to restrain him from trading in a particular place; for what can it signify to a tradesman in *London*, what another tradesman does at *Newcastle*? In this respect our law is agreeable to the *Roman* law; for that law would not enforce such contracts by an action. As if any person had agreed not to wash his hands, or comb his head, or change his linen for such a time, or to abstain from eating for several days, or the like. [* 232.]

Vide Puff. lib.
5. c. 2. sec. 3.

So any contract which, in its object, wantonly affects the interest, or the feelings of a third person, and thereby disturbs the peace of society, will be reprobated in a court of justice; nor will any action be retained thereupon.

Therefore a wagering contract, that a woman has committed adultery; or that an unmarried woman has had a bastard, would be void; because such wagers are not only an injury to a third person, but disturb the peace of society. Therefore the law will not permit third persons, merely for the purpose of laying a wager, thus wantonly to expose * others to ridicule, and libel them under the form of an action. [* 233.]

Upon this ground it was held, that no assumpsit would lie, upon a wager between two indifferent persons, as to the sex of Monsieur the Chevalier *D'En*; for although, whenever a question arises upon a real matter of right, it shall be tried, notwithstanding the interest of third persons, not parties, may be affected by it; yet two indifferent persons shall not, by a wager between themselves, injure a third by trying, in an action upon a wager, whether he is a cheat and impostor; nor attempt to shew in such an action that he is a woman, and be allowed to subpoena all his intimate friends, and confidential attendants to give evidence to expose him. *Da Costa v. Jones, Cowper 729.*

And an action upon a contract that wantonly tends to the introduction of indecent evidence, will not be retained in a court of justice.

As if a wager were laid that a woman had a defect in a particular part of her body; or that such a person was an hermaphrodite, or had a particular disorder; or as to the case why a woman did not breed, or the like.

Of the general Nature of Contracts or Agreements.

Executed contracts. **A**LL contracts or agreements are distinguished, in the law of *England*, into Executed or Executory. A contract or agreement is said to be executed, when two or more persons make over their right to one another, and thereby change the property therein, either presently and at once, or at a future time, upon some event that shall give it full effect, without either party trusting to the other: as where things are bought, paid for, and delivered; or where a man has lands under some engagement, and disposes thereof from the time such engagement ceases.

Contracts executed do not, in general, retain the name of Agreements, but are denominated by some particular term applicable to their respective natures. As, a Sale, a Grant, a Lease, an assignment, a Mortgage, or the like.

Executory contracts. [* 235.] * Executory contracts or agreements, according to the ordinary acceptation of the term Agreement, are such contracts as rest on articles, memorandums, parol promises, or undertakings, and the like, entered into preparatory to, and introductory of, more solemn and formal alienations of our property or free-agency. All promises or agreements to give, grant, sell, &c. belong to the former class: all promises or undertakings to do or suffer, belong to the latter class.

A contract, therefore, is said to be executory, either when one party performs and the other is trusted: as a loan of money, on a promise to secure it by a mortgage of land; or when neither party performs, but each trusts the other: as a promise to take in charge in respect of a premium to be given; or a covenant to make a lease in consideration of a sum stipulated to be paid for it.

Contracts or agreements are applicable to all rights, real, personal, or mixed, which may lawfully become the subject of traffic.

All

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All contracts and agreements, whether * executory [* 236.] or executed, may be considered: first, as express, constructive, or implicative. Secondly, as simple and absolute, or conditional. And, thirdly, as written or unwritten.

First, express contracts or agreements are where each party stipulates in positive terms, what is agreed to be done or omitted.

Constructive contracts, or agreements, are those where the law, in expounding the instrument upon which the contract arises, raises a contract of a different nature from that which, *prima facie*, the instrument imports.

Thus, though a grant or lease of tythes to a parishioner for a year is not good, *qua facta*, without a deed; yet the law will give effect to it, though it be in form of a lease, under the notion of its being an agreement to be discharged from tythes: which is an agreement by way of contract by retainer, and not a lease.

And the recitals in a deed for transferring property, respecting the grantor's estate in * that property, [* 237.] amount, by construction of law, to an agreement that the grantor is entitled as is stated in such recitals.

Thus where A. by his deed poll, reciting that "WHEREAS HE WAS possessed of certain lands for years for a certain term, assigned the same, by good and lawful conveyance, to J. S. with divers covenants, articles, and agreements in the said deed contained, which were or ought to be performed on his part:" the question was, whether this recital, *viz.* "Whereas he was, &c." was an article or agreement within the meaning of the condition of a bond which was given to perform covenants, &c. And it was held, that it was an agreement, because in such case the assignor agreed, that he was possessed of it; for, every thing contained in the deed was an agreement, and not only that which the assignor was bound to perform: as if a man recited by his deed, that he was possessed of a certain interest in certain land, and assigned it over by the same deed, and thereby covenanted to perform all agreements in the deed; if he were not possessed of such interest, the covenant would be broken. And it was clearly agreed, in the principal case, that if the party had

Express contract
Constructive contract
Cro. Ja. 137.
668. Yelv. 131,
132. Lev. 24.
Sir T. Raym. 14.
Skinner 113.

Swern v.
Clerke,
1 Leon 122.

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[* 238.] had not that * interest by a good and lawful conveyance, the obligation was forfeited.

Graves v.
White,

2 Freem. 57.
Et vid. ibid. 3.
2 Eq. Ca. Abr.
652. 1.

So a recital in articles made upon a marriage, "that whereas the defendant was to pay to the plaintiff one thousand pounds for the marriage portion of the wife; the plaintiff covenanted to settle, &c. was held to be a good ground to support an action of covenant, and the chancellor said, that court would decree the 1000*l.* to be paid.

Cro. Eliz. 657.

Upon the same principle, an exception in a deed *indented* is held to be an agreement: as if one let land to another, excepting a particular close; here the exception is an agreement; for the words of an indenture, put in the generality, bind both parties, and are taken to be the agreement of each party.

Plowd. 67.

1 Leon. 117.

But distinctions have been taken as to the effect of such an agreement; for it is said by *Montague*, Just. in *Dier* and *Manningham's* case, that if one make a lease for years of a manor, except a close, &c. rendering annually a rent, &c. and the lessee is bound to perform all grants, covenants, and agreements, *contenta, expressa, et recitata* in the indenture, and the

[* 239.]

* lessee disturb the lessor in the occupation of the close excepted, he has forfeited the obligation: for, when the grantor excepts the close, the grantee is content with it, and that the lessor shall occupy it; and then this is an agreement; and the words, "*contenta, expressa, et recitata*," do each of them go, as well to the exception as to the rest.

Cro. Eliz. 657.

1 RollRep. 102.

11 Rep. 50 b.

But the above case, as put by *Montague*, has since, in the case of *Lady Russel* and *Gulwel*, been denied to be law, so far as goes to the application of the obligation to the excepted part, as parcel of the premises; for, although it is agreed that an exception is an agreement of the lessee; that the land excepted shall not pass by the demise; yet, it is said, *there*, not to be any agreement, that he shall not occupy.

Lady Russel

v. Gulwel,

Cro. Eliz. 657.

S. C. Moore,

Pl. 747.

The case of *Russel* and *Gulwel*, arose on an action of debt for 500*l.* conditioned for the performance of all covenants, articles, and agreements in such an indenture (betwixt the plaintiff on the one part, and the defendant on the other part) on the part of the defendant to be performed. In the indenture was contained a clause, "that the plaintiff

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plaintiff let to the * defendant certain lands, called *E. Pastures, excepting a close called E. Close.*" The defendant pleaded, that he had performed all the covenants, &c. The plaintiff assigned for breach, that the defendant entered into the close excepted, and thereof disseised her, *et si, &c.* The defendant demurred in law. And, on the part of the plaintiff, it was contended to be a breach; for that the exception was an agreement, that the lessor should retain it, because an indenture is the deed of every of the parties; and that, therefore, the disturbance of the plaintiff from the occupying thereof, was a breach of the agreement. And of that opinion was *Gawdy*, Just. But *Popham* and *Fenner* were of a contrary opinion. They agreed, that an exception was an agreement of the lessee, that the land excepted should not pass by the demise; but they said, that it was not any agreement that he should not occupy. And, afterwards, this case was at another time moved again, and *Popham* said, that he had conferred with the other justices, and the greater part of them agreed, *that this exception was not such an agreement, as was within the intent of the condition of the obligation; and that the obligation was not forfeited by this disturbance.*

* And *Coke*, Chief Justice, in the case of *Stampe v. Lifford*, expressed himself to be of the same opinion, [* 241.] 1 Roll Rep. 102. and denied the case as put in *Plowden* to be law.

But it was admitted, in the case of *Russel* and *Gul-Supra*, *wel*, that sometimes an exception in a lease amounted to an agreement that should charge the lessee: but that was, where he agreed, on his part, that the lessor should have a thing *debors*, which he had not previously. As if the lessor let lands, excepting a way, or any other profit *a prender*; this it was said would amount to an agreement by the lessee, that the lessor should have the way or profit. And if the lessee were obliged to perform all the covenants and agreements in such an indenture, and he disturbed the lessor, he would, in this case, forfeit his obligation; for here the lessee would have an interest in the thing excepted.

So in debt upon bond where the condition was, Stevenson's case, 1 Leon. 324 that, whereas the plaintiff had covenanted with the defendant, that it should be lawful for the defendant to cut down wood for fire-boot and hedge-boot, without making any waste, or cutting any more than necessary: and the plaintiff assigned the breach in this covenant

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[* 242.] * covenant (which was in truth the covenant of the plaintiff) that the defendant had committed waste in selling wood, &c. and the condition was to perform all covenants and agreements: exception was taken, because the condition ought to extend but to covenants to be performed on the part of the lessee: but the exception was not allowed; for it was the agreement of the lessee, although it was the covenant of the lessor.

Cro. Eliz. 657.

Dyer 57.

21 E. 4. 6. a.

Pl. 18.

So a reservation of rent is as an agreement of both parties: on the part of the lessor for the reservation, and of the lessee to take the land at the rent proposed.

Styles 407. 431.

1 Vent. 10.

1 Roll 519. 10.

Thus where a lease for years was made by indenture, yielding and paying so much rent to the lessor: the words "yielding and paying," though not the words of the lessee, but the words of the lessor, enjoining the lessee to pay the rent, were held to make an agreement of the lessee to pay the rent.

Cro. Ja. 399.

Pl. 5. Popb.

136, 137.

1 Roll Abr.

[* 243.]

518. C. 1.

So these words in an indenture of lease, "and the said lessee, his executors and assigns, shall, from time to time, repair the said house, and shall leave it so repaired, &c." amount to * a clear agreement between the parties; and bind the lessee, by his acceptance of the lease.

Hob. 132.

It has been determined, upon the same principle, that a lease, *without impeachment of waste*, gives the lessee the trees growing upon the estate demised.

Ibid.

So, if the lessor covenant and grant, "that it shall be lawful for the lessee of a term certain, to take and carry away, to his own use, such corn as shall be growing upon the land at the end of the term;" although these words are not words of gift of the corn, but, merely, that it shall be lawful for the lessee to take it for his own use, yet are they sufficient to transfer the property.

And the reason on which these cases are so understood, seems to be, that where persons are agreed upon a thing, and words are expressed or written to make the agreement, although they are not apt and usual words, or whether they proceed or not from the proper party, yet, if they have substance in them tending to the effect proposed, and the proper party agrees to them,

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them, the law will give them * effect, by construction, according to the intent and common use of such words; for the law always regards the intention of the parties, and will apply the words to that which, in common presumption, may be taken to be their intent: and the agreement of the minds of the parties is the only thing the law respects in contracts; and, therefore, such words as express the intent of the parties, and have substance in them, are sufficient. [* 244.]

And, therefore, if a man be bound in an obligation, which is indorsed, that the obligee wills and grants, that if the obligor stands by the arbitrament, order, and judgment of A. and B. then the obligation shall be void: it is no ground of objection, that the words are the words of the obligee, and not of the obligor, but the condition is good; for there is the substance of a condition, and the intent of the parties appears. 21 H. 6. 51.
Fitz. Bar. 157.
Bro. cond. 53.
1 Leon. 246.

And a covenant by parol, takes effect as an agreement or contract.

Thus, wherever a man covenants by parol, without specialty, to do any thing for a certain sum of money, or the like; there, if he * do not according to his covenant: as if he either omit to do, or does in a bad manner the thing covenanted about, an action upon the case lies; because the covenant is a contract or agreement between them. Fitz. nat. brev.
341. 3 H. 6. 36.
[* 245.]
Bro. tit. Action
sur le Case, Pl.
7. 10. 69. 20 H.
6. 34. 14 H. 6.
15. 18 H. 6.
20 b. Vid. 11 H.
4. 33. Pl. 60.
Action on the
case does not
lie on covenant,
where nothing
done in perfor-
mance.

As if one covenant to cover in my hall or my house within a certain time, and then neglect so to do, by reason whereof the timber is damaged by the rain, an action on the case lies against the covenantor. So if one covenant to amend certain ditches on my land, and neglect so to do, by reason of which the ewes, who ought to feed within the ditch, come upon my land and destroy my corn, a good action on the case lies for this nonfeazance; or if a farrier covenant to shoe my horse, and he neglect to shoe him, or prick him in shoeing him; or if one undertake to plow my land in a seasonable time, and he do it in an unseasonable time, or neglect doing it, an action on the case lies. And the reason of all these cases is, that the *res gesta* amount to an undertaking and a matter *en fait*, rather than a thing sounding in covenant. 3 H. 6. 36. b.
Br. Act. sur le
Case 7. Con-
tract 5.
14 H. 6. 18. b.
21 H. 6. 55. b.

Implicative contracts are such as do not arise from Finch's law,
the 180.

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[* 246.] the special agreement of the parties, * but arise by act and operation of law, out of the circumstances of the case. As if, on a sale of goods, the buyer pay money in part of satisfaction, and afterwards the whole value of the goods be recovered against him at law; the money so paid upon that account, becomes money received for the use of him that paid it; and the law raises an implied assumpsit, upon which he may recover it in an action. So, if an hostler give my horse meat, or a taylor make my cloaths, the one shall have his action on an implied contract for his meat, and the other for his work. And he that receives money for my use, or to deliver it over to me, is chargeable as a receiver. So, if one enter into an infant's or another's land, and take the profits, he is chargeable as bailiff. And if a liberate be delivered to the clerk of the hanaper, who has assents in his hands, an action of debt lies against him. So does it upon every judgment.

So, wherever a man, by any means, hath the custody of goods belonging to another; the law implies a contract, by which he is bound to take care of them according to the nature of the bailment.

[* 247.] * In order clearly to understand the nature and extent of the contract the law raises in such cases, it is necessary to state what are the several sorts of bailments. There are six sorts of bailments.

L. Raym. 913. First. A bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor, and this is called "*depositum*." In this case the law implies a contract by the bailee, that he will take such care of them, as that they may not be damaged by any gross neglect of his own. For, in such case, it would be contrary to reason or justice, that where a man is to have no reward, but keeps the goods merely for the use of the bailor, that he should be charged without some default in him; it does not seem necessary that he should even do all he is capable of, or that a man could do for himself in things he was most concerned for. If he keep the goods with an *ordinary care*, he has performed the trust reposed in him. And this is going as far as the end and nature of such a contract requires; for it is not to be supposed, that in such cases a man engaged to take care, is to be at expences extraordinary,

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or to neglect other * affairs of his own, though perhaps less important in themselves, to attend other men's, as perhaps he might do if he acted for himself. But if the bailee keep the goods bailed to him as he keeps his own, it is evidence that he has discharged his undertaking. And, therefore, in such case, although he keep his own but negligently, yet, if he keep the others in the same manner, he shall not be chargeable. As if the bailee *be known* as an idle, careless, drunken fellow, and he come home drunk, and leave all his doors open; and by reason thereof the goods bailed to him happen to be stolen, with his own, yet he shall not be charged, because it was the bailor's own folly to trust such a fellow. And this doctrine is agreeable to reason, and to the civil law. *Ex eo solo tenetur si quid dolo commiserit: Culpæ autem nomine, id est, desidie ac negligentia, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiseret, quia qui negligenter amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet.*

[* 248.]
The proposition here put by Lord Holt is meant, only to illustrate the conclusion, - that, whatever care a man take of his own, that care, applied to such a deposit, is sufficient.

And if a person, receiving goods upon such a bare naked bailment, were to enter into a written undertaking to re-deliver them; it * would not charge the party undertaking further than he would be charged by the implication of law: for it would not go further than a covenant, that the covenantee shall have, occupy, and enjoy certain lands, which does not bind against the acts of wrong-doers.

Hob. 34. 3 Cro. 214. 2 Cro. 425.

The second kind of bailment is, where goods or chattels, that are useful, are lent to a friend *gratis* to be used by him. And this is called "*Commodatam*;" because the thing is to be restored in specie.

L. Raym. 913.

In this case the law implies, that the borrower contracts to use the strictest care and diligence, to keep the goods, so as to restore them back again safe to the lender; because the bailee has a benefit by the use of them. And, therefore, if the bailee be guilty of the least neglect, he will be answerable. As if a man lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, and any accident happen to it in the northern journey, or after the month, the bailee will be chargeable: because he has made use of the horse contrary to the trust he was lent to him under;

Ibid. 915.

and

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[* 250.] * and it may be, that, if the horse had been used no otherwise than he was lent, the accident would not have befallen him. This is agreeable to *Bracton*, who says, *Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est; sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta, vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio, amiserit non est dubium quin ad rei restitutionem teneatur.*

But if the bailee, in the preceding instance, had put the horse in his stable, and he had been stolen from thence, the bailee would not have been answerable for him, unless he or his servants had left the house or stable doors open, and the thieves had taken that opportunity, and had stolen the horse; for then he would be chargeable: because the neglect gave the thieves the opportunity to steal it. *Bracton* says, the bailee must use the utmost care, but yet he shall not be chargeable where there is such a force as he cannot resist.

[* 251.] * The third kind of bailment is, when goods are lent with the bailee to be used by him for hire; this, in the civil law, is called "*locatio*" et "*conductio*." And the lender is called *locator*, and the borrower *conductor*.

Ibid. In this case, the law implies, that the hirer contracts to take the utmost care, and to return the goods when the time of hiring is expired. But every man, how diligent soever he may be, being liable to the accident of robbery, though a diligent man is not so liable as a careless one; the bailee will not be answerable in this case, if the goods are stolen.

The fourth kind of bailment is, when goods or chattels are delivered to another as a pawn, to be a security for money borrowed of him by the bailor; and this is called

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called in *Latin*, * "*Vadium*;" and in *English*, a Pawn, [* 252.] or a Pledge.

And as to this, *Bracton*, 99 b. points out the nature of the implied contract. *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit nec impediatur creditum petere.* ^{ibid. 917. 29 Aff. 28.} So that, in effect, if a creditor take a pawn, he is bound to restore it upon the payment of the debt: but yet it is sufficient, if the pawnee use *due diligence*, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawner for his debt.

The same law applies in relation to goods found, the property in which continues in the owner, although the possession is in the finder. The law, therefore, implies a contract in the possessor to use an *ordinary diligence* to preserve them for the owner.

* But it is observable, in these cases, that, if the money, for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them: because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man who keeps goods by wrong, must be answerable for them *at all events*; for the detaining of them by him, is the reason of the loss. [* 253.]

The fifth kind of bailment is, when goods or chattels are delivered to be carried, or something is to be done concerning them by the bailee, for a *reward* to be paid by the person who delivers them. ^{1 L. Raym. 913}

These cases are of two sorts; either a delivery to one who exercises a public employment, or a delivery to a private person. If it be to a person of the first description, and he is to have a reward, the law implies that he contracts to answer for the goods at all other events, except acts of God, or of the enemies of the king. If he be robbed, he is chargeable,

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[* 254.] * able, be the force that attack him ever so great. This is the case of the common carrier, common hoyman, master of a ship, &c.

If the delivery be to a person of the second description, of which nature are bailees, factors, and such like: these, though to have a reward for their management, yet are only to do the best they can. If, therefore, the bailee be robbed, he cannot be chargeable; for it would be unreasonable to subject him to the execution of a trust, further than the nature of the thing puts it in his power to perform it. The law, therefore, in the case of a bailee, factor, or the like, implies a contract to use his abilities to take care of that with which he is entrusted,

Ibid.

The sixth sort of bailment is, when there is a delivery of goods or chattels to some body, who is to carry them, or do something about them *gratis*, without any reward, for such his work or carriage. And this is called, in the language of the *Civilians*, "*mandatum*. It is an obligation which arises *ex mandato*. It is what we call in *English* an acting by commission. And if a man acts by commission for * another *gratis*, and in executing his commission behaves himself *negligently*, he is answerable.

[* 255.]

Ibid. 916.
Keilw. 160.
2 H. 7. 11.
22 Aff. 41.
Bro. Act fur
ca. 78.
1 Vent. 121.
10 H. 7. 26.
29 Aff. 28.

But, in these cases, there will be a difference in the implied contract, on the evidence how the undertaking appears to have been entered upon; whether generally or specially: for in the former case, the undertaker only contracts in law against *gross neglect*. And, therefore, if one undertake to carry *brandies* for another, and mischief be done to it, by some person meeting the cart that it is in by the way, the bailee will not be liable: as if a drunken man come by in the street, and pierce the cask. And the reason is, *that the bailor is to have nothing for his pains*. But in the latter case, namely, if a man *take upon himself* expressly to do such an act *safely and securely*, if the thing come to any damage by his *mis carriage*, the law implies a contract that he will be answerable; the reason for which is, *that he undertakes the task, and is entrusted upon those terms*.

The law also implies a contract where the sheriff levies money on a *levari facias*, &c. and returns *paratus habeo*,
and

Speck v.
Richards.
Hob. 206.
Parkinson v.
Colliford,
March 13.

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and does not * deliver it in court; and an action of debt lies against him in such case; because, although there be no express contract, yet there is a contract in consideration of law; for, *when* the money is levied, the action *ceases* against the party, and is *ipso facto*, transferred to the sheriff. [* 256.]

Upon the same principle of an implied assent, the law concludes that, if one man take another man's wife and cloath her, he intends to give the apparel unto her; and her husband may take her with the apparel, and no action lies against him. 3 Cro. 344.
Finch. 22.
1 H. 4. 83.

It is held, on the same reason, that if a man deliver stuff or other wares to another man's wife (knowing her to be a feme covert) to make apparel, without her husband's privity or allowance; it is a gift of the stuff unto her: and her husband shall not be charged in any action for it.

So the law implies an agreement that the grantee of one thing, shall have every other thing necessary to the full enjoyment of what is granted.

* Thus if a man grant to me all his trees growing in his woods; he is taken by implication to grant me leave to come upon the ground, and cut them down, and carry them through his land. [* 257.] Plowd. Comm. 15.

So if land be granted to a man; the law implies an agreement that he shall have a way to it, although it be not expressly mentioned.

Again, If a man license another to lay leaden pipes in his land for the purpose of conveying water to the other's cistern; the law implies an agreement that the grantee may enter, and dig up the land to mend the pipes. Saund. 322,
323.

And equity, also, in some cases, implies contracts, without any express agreement of the parties.

Thus if A. sells lands to B. who afterwards becomes a bankrupt, part of the purchase money not being paid; here equity implies a contract or agreement, that the land shall stand charged with so much of the purchase money as was not paid, without any special contract for that purpose: and, to give this Tardiff v. Scrugham,
8 Dec. 1769,
per L. Camden.
Et vid. Brown
Rep. Chan.
423, 424.
Pollexfen
v. Moore,
3 Atk. 271.

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constructive

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[* 258.] * constructive agreement effect, equity considers the purchaser to be a trustee, to the extent of the money, for the vendor.

Dig. lib. 19.
tit. 2.

So if, after the time stipulated, the lessee continues to enjoy the thing *leased* without any opposition from the lessor; both of them are supposed not only to prolong the contract until they declare off, *but for such a time as the original lease was measured by*, and on the same conditions; for, *qui impleto tempore conductionis remansit in conductione, reconduxisse videbitur*. And, therefore, if there be lessor and lessee for seven years, and the lessee hold over after the seven years determined, he is from thenceforward considered, in law, as tenant from year to year; for, during the seven years, the term is executory for every year, and, in respect to the execution of it, it is the same as if there had been several contracts, one for one year, and another for another year, and so for every year severally. And the tenant holding over, is considered as doing so, upon the same terms as he engaged upon originally.

Secondly, contracts and agreements, we have observed, are either simple and absolute, or conditional.

[* 259.] * A contract or agreement is said to be simple and absolute, where one party obliges himself positively and without condition to such or such a performance; in which case the other party may require it to be carried into effect: as if I make a lease for years to another,

Fitzh. tit. Debt
129.
2 H. 7. 12.
3 H. 7. 14.
Keilw. 69, 77.

and he, in consideration thereof, promise to pay me a rent by the year; this is a good contract, and upon failure in performance will support an action of debt for the rent yearly. So if I sell my lands for twenty pounds to be paid on a day certain; in this case, if the money be not paid, I may, after the day, maintain an action for the money, though the land be not assured; for the purchaser may compel me to assure it. Again, if a man take my money, and promise to build me a house by such a day, this is a good contract, and I may sue for breach of it.

Conditional contract.

A conditional agreement is, where the obligation thereof is, in some respect, made to depend upon some particular and uncertain event; or, at least, an event uncertain at the time in the minds of the contracting parties, proceeding either from the act of God, or the act of the parties. As if I agree to purchase an estate of B. on condition that my son

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* son returns from *India* on such a day. This condition, until it happens, suspends the obligation; and if it does not happen, disannuls it. [* 260.]

So if I agree to give one thousand pounds to A. if he marry B. my daughter; here the obligation to pay the money is suspended, until the event stipulated takes effect.

Again; if an agreement be, that if B. deliver me ^{33 H. 6. fol. 43} twenty pounds worth of cloaths, or assure me such a piece of land, that I shall pay him twenty pounds: this is a good agreement conditionally; and after the performance of the condition (but not before) B. may maintain an action for the money.

So, if one sell cattle, upon condition that if the vendor do such a thing, then he shall have twenty pounds for them, else but ten pounds; this is a good contract, and the same will be more or less, as the condition is or is not performed. ^{Perk. sec. 712.}

And some contracts or agreements are conditional, ^{17 E. 4. r.} with a reference; in which case they * are imperfect, [* 261.] until the reference made: as if A. and B. bargain and agree, that B. shall go upon A.'s land and see his corn, and, *if it please him upon sight*, that *then* he shall have it, paying to A. forty pounds for every acre: here the contract is binding upon A. if B. likes the corn, otherwise not.

So if I bargain with you, that I will give you for ^{Dyer 91 b.} your land as much as it is reasonably worth, and refer ^{14 H. 8. 17.} to a third person to adjudge what is the value: here the contract is incomplete, until the referee adjudge the value; but after the value adjudged, both parties are bound.

Conditions added to contracts, may be divided into two kinds: namely, first, Unlawful; and, secondly, Lawful.

First, as to unlawful conditions.

The effect of adding an unlawful condition to a contract, varies according to the nature of the contract, and of the condition. For, if a man be bound, upon condition that he do an act *malum in se*; as that he kill A. S. the bond is void. But if a man make a ^{Co. Litt. 206. b.} feoffment,

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[* 262.] * feoffment, upon condition that the feoffee shall kill J. S. the estate is absolute, and the condition void. In both instances the law aims at the same object, namely, the preventing the crime. For, in the former case, lest the obligee should have any temptation to do the act, the law frees him from the penalty of the bond. And for the same reason the law, in the latter case, secures to the feoffee the possession of the land, without performing the condition.

Ibid. et Cro. Ja.
596. 13 H. 7.
et vide Freeman
v. Freeman.
2 Vern. 233.

All conditions that are repugnant to the nature of the contract entered into are void, as being against law. And, therefore, if a man make a feoffment in fee, upon condition that the feoffee shall not alien, this condition is repugnant and void; and the estate of the feoffee is absolute: because the power of aliening is incident to the grantee of a fee.

Ibid.

Upon the same principle it is held, that, if a man make a feoffment in fee, upon condition that the feoffee shall not take the profits of the land; this condition is against law, as being repugnant to the grant: for the feoffment of the land includes the profits; and the estate is absolute.

[* 263.] * But a covenant or bond, with a condition that the feoffee shall not take the profits of the land, or shall not alien, is good.

Ibid.

The reason of these distinctions is, that in case of the covenant or bond, the feoffee may alien or take the profits, if he will forfeit his covenant or bond; consequently there is no total bar to alienation or receiving the profits: but otherwise it is, as to such a condition, added to the feoffment; for if that were good, no alienation or taking the profits, could take effect.

Secondly, lawful conditions may be divided into possible and impossible.

Lawful, possible conditions, may be divided into three sorts, according to the effects they produce.

First; such as *accomplish* the contracts that depend upon them: as if a man agree with his lessee for years, that, upon payment of 100*l.* within the term, he will convey to him the fee.

Secondly; such as *dissolve* a bargain: as if
a lease

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* a lease be made, with a condition to be void if the [* 264.]
 lessee under-let, or, if he become a bankrupt, or the like.

Thirdly; such as neither *accomplish* nor *dissolve* a contract or bargain, only making some change in it: as if one agree, that if 6 *per cent.* (being the interest due upon a mortgage) be paid within three months after it becomes due, the interest shall abate to 5 *per cent.* Of the same nature is an agreement, that, in case an house that is let furnished, be given up to a future tenant without certain moveables, which are promised him, the hirer shall have it so much the cheaper.

Again impossible conditions are divisible into such as are so, at the time of entering into the contract; and such as become so by matter, *ex post facto*.

There are several diversities in the cases of impossible Co. Litt. 206.
 conditions, in their effects on contracts: *Ex, gratia*, if

a condition, possible *at the making thereof*, but becoming impossible by the act of God, be annexed to a *contract executed*, as a feoffment, gift in tail, or the * like; the [* 265.]
 estate of the feoffee, &c. shall not be avoided thereby; as if a man make a feoffment, upon condition that the feoffor go to the city of *Paris* about the affairs of the feoffee, and presently after the feoffor die, so as that it is impossible, by the act of God, that the condition should be performed, the estate of the feoffee is nevertheless become absolute. But if such condition be added to an *executory contract*: as if there be a bond, recognizance, and the like, with condition that the obligor shall appear the next term in such a court; if, before the day, the obligor or conusor die, the recognizance or obligation is saved. And the reason of this diversity is, because the estate in the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent; namely, the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken, until there be a default in the obligor. And, therefore, in all cases, where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and, before the same can be performed, the condition becomes impossible, by the act of God, or of the
 the

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[* 266.] * the law, &c. there the obligation is saved. But if the obligation of a bond, &c. be impossible at the time of making the condition, the obligation, &c. is single: as if a man be bound in an obligation, &c. with condition, that, if the obligor do go from the church of *St. Peter*, in *Westminster*, to the church of *St. Peter*, in *Rome*, within three hours, the obligation shall be void. Here the condition is void and impossible, and the obligation stands good. And the law is the same in case of a feoffment in fee, with condition subsequent, that the feoffee shall go as aforesaid, the estate of the feoffee is absolute, and the condition impossible and void.

Fitzh. Oblig.
13. Bro. tit.
faits 37.
Plowd. 32.

But, in this respect, there is a distinction between a condition of this kind that is *precedent*, and such a condition *subsequent*; for, in the former case, no estate or interest will grow upon it; as if a man make a lease for life, upon condition that, if the lessee go to *Rome*, as aforesaid, then he shall have a fee: here the condition precedent is impossible and void, and therefore no fee simple can grow to the lessee.

[* 267.] And a distinction is also taken upon bonds, * recognizances, and executory contracts, where the impossible condition is part of the bond, recognizance, or contract, and where it is indorsed or underwritten; for, in the former case, the instrument thereby becomes void.

Pulleiton v.
Agnew. 1 Salk.
172. Bro. tit.
faits 37.

Therefore where, on a *scire facias* against bail, reciting a recognizance taken in the time of King *William the Third*; wherein the condition was, that the defendant should render his body *Prisonæ Mar. Maresch. Dominae Reginae nunc*: it was urged, that the condition was impossible, and in consequence the recognizance single. *Et per Holt*, Chief Justice, where the condition is underwritten or indorsed, there that is only void, and the obligation is single; but where the condition is *part of the lien itself*, and *incorporated* therewith, if the condition be impossible, the obligation is void.

We must carefully distinguish between conditions annexed to contracts or agreements, and circumstances annexed which seem to import conditions, but which are modal only, neither suspending, disannulling, nor altering the obligation of them, but only relating to the manner of performance: as that an agreement shall

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* shall be performed at a certain day, or in a certain [* 268.] place.

Thus, if a man have land let out on lease, and enter into an engagement for sale thereof, upon condition of its being freed at a certain day; such a clause neither suspends, nor disannuls the obligation of the agreement, but only amounts to a stipulation, by which the seller puts off the delivery of the thing sold, till it is at liberty, which he engages it shall be at a certain time. So, if two persons enter into a contract for sale of an estate, and the conveyances are agreed to be made, and the purchase money paid at such a place and time: the obligation of the agreement binds the parties from the moment it is entered into, and the time and place are only circumstances that affect the performance of the engagement. Of this nature also are all collateral or incidental circumstances, attending agreements for sale of land, &c.

Noy's Maxims
89.

Such statements do not import conditions, whereby the parties are to be considered as contracting on the ground of a strict compliance; but are mere circumstances that admit of compensation. And in this respect * our law proceeds upon the same principles as the Roman law. For if one had land engaged, and sold it upon condition of freeing it at such a time; in this case that law allowed the buyer to have an action against the seller, to force him to free his land at the time appointed, or let him into possession. *Nam si id actum est, ut omni modo intra Kalendas Julias venditor fundum liberaret, ex erupto erit actio, ut liberet; nec sub conditione eruptio facta intelligetur: veluti si hoc modo eruptor interrogaverit, erit mihi fundus eruptus, ita ut intra Kalendas Julias liberet? vel ita, ut intra Kalendas à Titio redimas? Si vero sub conditione eruptio facta est, non poterit agi, ut conditio impleatur.*

[* 269.]

Dig. l. 18. tit. 1.
De contra-
hend. erupt,
&c. leg. 41,
init.

Thirdly. Contracts and agreements are either written or unwritten.

This distinction between written and unwritten contracts or agreements, seems to have originated with the statute of frauds and perjuries, which was passed in the 29th Car. 2. and was made to prevent persons from swearing verbal agreements upon others, and thereby charging the parties in equity to perform them, though

Quære, if be-
fore statute of
frauds, mere
parol agree-
ments were
favored? Treat
Eq. 18, 19.

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[* 270.] though the agreements had * never been made. To
 28 Car. 2. c. 3. this intent the statute enacts, " that no action shall be
 brought, whereby to charge any person upon any agree-
 ment made upon any consideration of marriage, or up-
 on any contract or sale of lands, tehements, or here-
 ditaments, or any interest in or concerning the same,
 or upon any agreement that is not to be performed
 within the space of one year from the making thereof,
 unless the agreement upon which such action shall be
 brought, or some memorandum or note thereof shall be
 in writing, and signed by the party to be charged there-
 with, or some other person thereto by him lawfully
 authorized."

In observing upon the effect and operation of this
 statute, I shall first consider what has been the construc-
 tion of the words in the order as they stand, and, secondly,
 what are the exceptions out of the statute.

The first words then are, " no action shall be brought
 to charge any person." And thereupon it is observ-
 able, that, although by these words, suits in *Chancery*
 for the specific execution of contracts or agreements are
 [* 271.] not expressly prohibited, yet, courts of equity, * upon
 a principle which will be hereafter explained, were,
 for the most part, consequentially, thereby deterred
 from retaining suits upon contracts or agreements not
 made conformable to the statute, unless in cases where
 some circumstance intervenes, whereon an equity may
 be raised, notwithstanding the requisitions of the sta-
 tute are not complied with.

The next words that occur in this clause of the sta-
 tute of frauds, are the words, " any agreement, &c." And
 hereupon it has been held, that, although the
 words of the statute be general, namely, " upon any
 agreement made upon any consideration of marriage,
 or upon any contract or sale of lands, &c." which
 phrase is sufficient, in point of extent of operation, to
 comprehend *all* agreements, and *all* contracts; yet as,
 in the true construction of this, as of every other sta-
 tute, the end and intent of the makers of it is to be
 considered, and that was to prevent frauds and perju-
 ries, all contracts and agreements which, though not
 in writing, are *in their own nature* free from all danger
 of introducing fraud or perjury, are out of the purview
 of this statute.

Upon

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* Upon this ground it has been determined, that a [* 272.]
 judicial sale of an estate under a decree, is clearly out
 of the mischiefs intended to be prevented by the statute:
 therefore, where A. being likely to die, made a con-
 veyance of a real estate in favour of a charity, and then Att. Gen. v.
Day, 1 Vez.
218.
 made a will, by which he gave 3000*l.* (the exact value
 of that land) and also 250*l.* to the same charity, and
 gave the estate to D. (wife of B.) and C.—A bill in
Chancery was brought for an account, and for a settle-
 ment of the estate under the will; and a decree was
 had thereupon, and a master was thereby directed to
 receive a scheme for carrying the conveyance into exe-
 cution, the foundation of part of which was, to con-
 sider in what way the money should be laid out, and a
 perpetual fund created for maintenance of the charity.
 The master reported a scheme for laying out the 3000*l.*
 in the purchase of lands, and the 250*l.* in other lands
 convenient for building a charity school. Then the
 case was set down for the charity to be heard on the
 matter reserved, and the court made a decretal order,
 confirming the master's report, and ordering that the
 scheme should be approved of, and the other matters
 therein carried into * execution: none of these direc- [* 273.]
 tions were opposed, but they were all acquiesced under
 by B. and D. who survived him. After her (D.'s)
 death, an information was brought in behalf of the
 charity, together with the administratrix of D. to have
 this purchase carried into execution by the aid of the
 court, against the devisee of the heir at law of D. and
 the infant son of C. the co-devisee with D. And, it
 being objected that there was no agreement signed pur-
 suant to the statute of frauds, one question was, whe-
 ther the transactions that passed in life of D. and C.
 amounted to a binding agreement on those parties for
 the sale of the land? and Lord *Hardwicke* was of opi-
 nion, that here was such an agreement as the court
 ought to execute, notwithstanding the statute of frauds;
 this being a judicial sale of the estate, which took it en-
 tirely out of that statute.

The principle upon which the preceding case rests,
 is this; the order of the court was not interlocutory,
 but made part of the decree, as it always does on
 the matter reserved, though made at another day;
 and it includes, as well the carrying the purchase in-
 to execution, as the establishment of the charity,
 amounting

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[* 274.] * amounting to a decree for the conveyance of the estate on one side, and payment of the money on the other, and the purchaser may be prosecuted for a contempt, in not obeying the order.

Per Lord
Hardw. i Vcz.
221.

Upon the same principle it is held, that purchasers before the master are out of the statute; and, therefore, the court of *Chancery* will, in such cases, carry into execution, against the representative, a purchase by a bidder before the master without the bidder's subscribing, after confirmation of the master's report that he was the best purchaser: the judgment of the court taking such cases out of the statute.

Ibid.

So, if the authority of an agent, who subscribes for a bidder before a master, cannot be proved, yet, if the master's report can be confirmed, the court will carry it into execution, unless there be some fraud; for it is all exclusive of any defence that may still be set up on the other side.

Cox v. Peete,
Brown's Rep.
[* 275.]
Chan. 1788,
fol. 334.

And Lord *Thurlow* was of opinion, where the attornies, concerned in a suit by a first mortgagee for a foreclosure, agreed, with * respect to the final decree, that the estate should be sold, the first mortgagee paid her principal and interest, and the remainder paid to the second mortgagee, but that the former should, in the mean time, take a decree; that, if the first mortgagee made an improper use of the decree, this agreement, though by parol, might be read, on an application to open the foreclosure, as an agreement relative to a decree, the attornies being competent to make agreements relative to the order of the court. And upon that ground his lordship, on an appeal from the *Rolls*, admitted the evidence of it *de bene esse*, although it had been rejected by his honor, on the ground that the agreement was not in writing, and, therefore, void under the statute of frauds.

1 P. Will. 714.

And an agreement with the court of aldermen, (who are guardians of city orphans, and without whose leave no man can marry such orphan but under pain of imprisonment) though by parol only, and without writing, was held good: this being an institution that existed previous to the statute.

The next words that we meet with, in the clause
now

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now under discussion, furnish a * description of the sub- [* 276.]
ject of an agreement, viz. "made upon any consideration of marriage," or, "upon any contract or sale of lands, tenements, or hereditaments."

And, upon this part of the clause it is necessary to observe,

First, That whether the contract or agreement originate with reference to a marriage, or a sale, or the like, the construction of the statute, as applied thereto, will be the same.

Secondly, That the statute goes equally against an agreement for making a mortgage of a real estate without being in writing, as against an agreement for a purchase if not in writing; for as the latter can be no lien, so neither can the former be a security. Per Lord Hardw. 3 Atk. 4.

Then come the following words, "or upon any agreement that is not to be performed within the space of one year from the making thereof." And hereupon it has been held, that this part of the clause in question, does not extend to any agreement respecting lands or tenements. Hollis v. Edwards, 1 Vern. 159.

* The legislature then proceed to the enacting the provision, made by the statute, for securing persons from the mischiefs meant to be prevented, viz. "Unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." [* 277.]

These words of the clause have afforded three points for legal discussion, namely,

First, As to what was meant by the legislature, when it required "some note or memorandum (of every agreement) in writing."

Secondly, As to what circumstance will amount to a signing.

Thirdly, As to what persons *must sign*.

And, as to the first point, it has been held, that, as well *marriage* agreements as others, where, on a treaty for a marriage or any other treaty, the parties come to an agreement, but the same is never reduced into writing,

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[* 278.] ing, nor * any propofal made for that purpose, fo that the parties rely *wholly* on their parol agreement ; neither party can compel the other to a fpecific performance, for the ftatute is directly in their way.

Countefs Mon-
tacute v. Sir
George Max-
well, 1 P. Will.
618. Pre. Chan.
526.

And, therefore, where a bill fet forth that the defendant, before his intermarriage with the plaintiff, did promife that fhe fhould enjoy her own eftate to her feparate ufe ; that he had agreed to execute a writing to that purpofe, and had inftructed counfel to draw fuch a writing ; and that, when they were to be married, the writing not being perfected, the defendant defired this might not delay the match, in regard that his friends being there, it might fhame him, but engaged that, *upon his honor*, the lady fhould have the fame advantage of the agreement as if it were in writing drawn in form by counfel, and executed ; and that thereupon the marriage took effect : it was held, on a bill for fpecific execution, that, where there was no fraud, the plaintiff relying folely upon the honor, word, or promife of the defendant, the ftatute making thefe promifes void, equity would not interfere ; and that the circumftance of the inftruction having been given * to counfel for preparing the writings was not material, fince, after they had been drawn and ingroffed, the parties might have refufed to execute them.

[* 279.]

Seale v. Morris,
1 Ca. Ch. 135.

But it feems to have been formerly doubted, whether, if it were charged that the agreement was ftipulated to be put in writing, this circumftance would not be a fufficient ground for excluding the ftatute from attaching upon the agreement. For, in the cafe of *Seale and Morris*, which arofe on an agreement that the defendant fhould affign a term of years in his houfe and plate, and certain veffels of beer for two hundred guineas, one guinea to be paid in hand as earneft of the bargain, and nineteen guineas more three days afterwards ; and wherein part of the bargain was, that it fhould be executed by writings by a certain time ; the defendant pleaded the ftatute, and that it was a parol agreement, and that none of the goods had been delivered ; that therefore there ought to be no relief in law or equity ; but he confeffed the receipt of twenty guineas, and offered to repay them : the Lord Keeper faid, it was clear the defendant ought to repay the money, for it was charged that the agreement was to have been

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been * put in writing : and his lordship over-ruled the [* 280.]
plea.

So, in the case of *Hollis* and *Whiteing*, which was a Hollis v. Whiteing, 1 Vern. 151. bill to have the execution of a parol agreement for a lease of a house, setting forth that, in confidence of this agreement, the plaintiff had laid out and expended very considerable sums of money ; the statute was pleaded, and the plea allowed. But the lord Keeper said he was of opinion, if the plaintiff had laid it in his bill that it was part of the agreement that the agreement should be put into writing, it would have altered the case, and possibly have required an answer.

But, in the cases of *Hollis* and *Edwards*, and *Dean* Hollis v. Edwards, Deane v. Izard, 1 Vern. 159. S. C. 1 Eq. Ca. Abr. 19. Pl. 1, 2. and *Izard*, wherein bills were exhibited to have an execution of parol agreements touching leases of houses, which set forth that, in confidence of these agreements, the plaintiffs had expended great sums of money in and about the premises ; and where the agreements were respectively laid to be, *that it was stipulated the agreement should be reduced into writing*, the statute was pleaded. And the Lord Keeper said, that the difficulty which arose upon this act of parliament was, * that the act made void the estate, but did not say the agreement itself should be void ; and, therefore, though the estate itself were void, yet possibly the agreement might subsist, so that a man might recover damages at law for the non-performance of it ; and if so, he would not doubt to decree it in equity. And his lordship directed that the plaintiffs should declare at law upon the agreements, and that the defendants should admit the agreements, so as to bring this point in judgment at law, and then, he said, he would consider what was further to be done in the case. [* 281.]

There being no further proceedings on this case, it is reasonable to suppose that it was held, the action could not be maintained at law.

And the determination in the case of *Bawdes* Bawdes v. Amhurst, Pre. Chan. 402. and *Amburst*, seems in a great degree to warrant this conclusion : for, in that case, the agreement was actually put into writing by way of memorandum, and the completion thereof prevented by the death of one of the parties. The circumstances of this case were as follow : a marriage treaty was depending,
and

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[* 282.] * and the intended husband, and the young lady's father, went to a counsellor's chambers to have a settlement, in consideration of the portion the father proposed to give, drawn; at this meeting, minutes of the agreement were taken down in writing by the counsel, and given by him to his clerk, to be drawn up in form. The next day the father died, and the day following the marriage was solemnized. And this agreement, notwithstanding the preparations, was held, by Lord Cowper, to be within the statute of frauds and perjuries, it being no agreement, but only preparatory heads which were afterwards to be drawn into form. It might, therefore, have received several alterations or additions, or been entirely broke off upon some further enquiry or information of the party's circumstances.

Vide 3 Atk. 504. This case, referred to and approved by Lord Hardwicke, so far as the reasons here given extend.

Hawkins v. Holmes, 1 Will. 770. et vide Lowther v.

[* 283.] Carrill, 1 Vern. 221. et Whaley v. Baganal, 6 Brown's Par. Ca. 45.

And, in a subsequent case, the decision was still stronger as to this point. In the instance alluded to, the plaintiff agreed with the defendant to sell him a house for 640*l.* and, by consent of both parties, an attorney was employed to make a draft of the conveyances; which the attorney accordingly prepared and sent to the defendant, who made several * alterations therein in his own hand-writing, and delivered it back to the attorney to be engrossed. Then a time was appointed for the parties to meet at a tavern to execute the writings, and for the defendant to pay the money. The plaintiff and his attorney went to the tavern, and the plaintiff there executed the writings. Then the plaintiff, having got the conveyance registered, the estate being in *Middlesex*, brought his bill against the defendant to compel him to pay his purchase money. The defendant pleaded the statute of frauds. And although the agreement was actually put into writing in the draft of the conveyance, which had been altered by the defendant with his own hand, yet it was held that the defendant was not bound, he not having signed the agreement.

Secondly, As to what shall be a signing within this clause of the statute.

Vide Duckhouse v. Croll, 2 Eq. Ca. Abr. 32, Pl. 44.

And hereupon it has been said that, if the name of the party against whom the suit is preferred, be in any way found upon the instrument, this will be a sufficient signing within the statute, *if the intent of the parties was that the person should be bound*, and an acceptance

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* acceptance is shewn on the other side. And, there-
fore, where a mother was not a party to a deed of ar-
ticles made on her daughter's marriage, but was proved
to have known and agreed to them, and to have been
privy to the actual marriage which took place upon
them, and signed them as a subscribing witness: this
was held, by the Master of the Rolls, and afterwards
by Lord *Hardwicke*, to be a sufficient signing, within
the spirit, and also within the words of the statute. And
the mother was decreed to perform her part of the
agreement.

[* 284.]
Welford v.
Beezley, 1 Vez.
6, 7 Wilfon

But, in the before-mentioned case of *Hawkins* and
Holmes, in which the defendant pleaded the statute of
frauds and perjuries, and said, "that neither he, nor
any by him lawfully authorized, signed any writing,
agreement, memorandum, or note, in relation to this
purchase, or whereby the defendant in any wise agreed
thereto." It was objected, that the defendant's alter-
ing the draft with his own hand, was a signing, it not
being material to what part of the draft his hand was
set. But the chancellor said that, unless in some par-
ticular cases, the parties signing the agreement, was
absolutely necessary for the * completing of it; and
to put a different construction on the act, would be to
repeal it.

[* 285.]

This point was submitted to the opinion of the court
of *Exchequer*, in the case of *Stokes* against *Moore et Uxor*,
and was there decided upon somewhat narrower ground
than that taken by Lord *Hardwicke*, in the before-
mentioned case of *Buckhouse* and *Crossy*. The former
case arose on a bill for the specific performance of an
agreement for the renewal of the lease of a house by M.
and his wife to S. There had been some difficulty
about the terms of renewal, but at length they came to
an agreement; and M. being called upon by S. to
name a person to prepare the lease, named a Mr. T.
for that purpose, and wrote certain instructions from
whence the lease was to be prepared in these words,
namely, "the lease renewed, S. to pay the king's tax,
also to pay M. 24/ a year, half-yearly; S. to keep the
house in good tenantable repair, &c." To this bill
the defendants pleaded the statute of frauds; and that
plea having been ordered to stand for an answer, with
liberty to except, and the defendants having then by
their

Stokes v. Moore
et Ux. vide
1 P. Will. 771,
note 1, last
edit.

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[* 286.] their answer admitted the * written instructions; one question made on the hearing of the cause was, whether there was a sufficient signature by M. to take this agreement out of the statute of frauds. And it was held by the court unanimously that there was not; for, that the signature required by the statute was to have the effect of giving authenticity to the whole instrument; and where the name was inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found: as in the formal introduction to a will. But it could not be imagined that the name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required.

Thirdly, as to what persons must sign an agreement.

Vide Halfpenny v. Ballet,
2 Vern. 373.
S. C. 1 Eq. Ca.
Abr. 40. Pl. 6.
et infra.

[* 287.] * either by some writing under his hand or some act done from which the law will infer the agreement.

Hatton v. Gray,
1 Eq. Ca. Abr.
21. 10. S. C.
2 Chan. Ca.
64.

Thus where A. sold houses to B. for two thousand pounds; and A. drew up a note of the agreement in writing, which B. signed, but A. did not sign; it was objected, on a bill by A. against B. to compel him to a specific execution of this agreement, that this was within the statute; for, the note bound not him that did not sign it, and they must be both, or neither, bound in equity. But it was decreed, that B. was bound thereby; for, A.'s drawing up the agreement in his own hand, and procuring B. to sign it on his part, made the signing of B. not only a signing for himself, but also a signing as authorized by A. to close the agreement: and, therefore, as, if B. had come into a court of equity against A. the court would have decreed the agreement against him, so would it likewise decree it against B. on a bill filed by A.

And a letter will, in equity, amount to an agreement, and be binding on the person signing it, if another

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ther person, by *acting upon it*, * shew his acceptance of [* 288.] the propositions therein contained.

Thus where, on a treaty of marriage between A. and B.—B.'s father promised to give her 4000*l.* but, when he perceived A. and B. to be mutually engaged, began to recede from his promise; whereupon A. got a letter wrote to the father by a friend of his, desiring him to be plain and ascertain what portion he would give A. with his daughter, and he agreed to give 1500*l.* down and 500*l.* more at his death, if he should have issue; and the marriage was had. It was held, that this letter was a good agreement binding upon the father, and that A. upon his marriage, became well entitled to the 1500*l.* agreed by the father, under his own hand, to be paid as a portion to his daughter.

So, where a father wrote a letter signifying his assent to the marriage of his daughter with J. S. and mentioning that he would give her 1500*l.* And he afterwards, by another letter, upon a further treaty concerning the marriage, went back from the proposals of his letter; and then, at some distance of time declared, that he would agree to what was * proposed in the first letter. This letter was held a sufficient promise in writing within the statute of frauds; the last declaration having set the terms in the letter up again, and J. S. having shewn, by his marriage of the daughter, his acceptance of the terms.

Again, where A. possessed of tythes by a demise for twenty-one years, covenanted, in consideration of 350*l.* to convey them to B. his executors and assigns; and then C. treated with B. for them, and B. sent his son and two other persons with a letter to C. wherein B. said, "that if he parted with the tythes, it should be on the conditions therein particularly mentioned." C. accepted of the terms, and the next day sent his attorney to acquaint B. therewith, and B. delivered to the attorney a copy of A.'s agreement, and appointed a day for executing the same; but, in the mean time, B. went to A. and settled a conveyance from A. It was decreed, that B. should perform this agreement with C. for the letter took the case out of the statute of frauds, as being an agreement signed by the party to be charged with the same; and there was no need, the lord keeper said, for its being signed by both parties.

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[* 290.] * But a letter from a father to his daughter, by which he gave her 3000*l.* portion, but which was not shewn to the man who afterwards married the daughter, was not considered as entitling the son-in-law to a decree for the 3000*l.* although he had married the daughter. The reason for which seems to have been, that the son-in-law could not be considered as having, by the marriage, accepted an agreement of which he had no knowledge.

Seagood v.
Meale, et al.
Prec. Chan. 560.
S. C. 2 Eq. Ca.
Abr. 49. 20.
Strange 426.
Et vide Clerk
v. Wright.
1 Atk. 13.

Such a letter cannot be set up as an agreement, unless it contain the precise terms of the contract at large; and, therefore, on a bill for a specific execution of an agreement for the purchase of nine houses which were in mortgage for 150*l.* stating that the vendor had agreed to sell them to the vendee for such a sum of money, and had sent a note to the mortgagee to the effect following, *viz.* Mr. C. pray deliver my writings to the bearer, I having agreed to dispose of them; it was held, upon the question, whether this letter or note would bring the case out of the statute, that it would not; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for it did not mention * the sum that was to be paid; nor the number of houses that were to be disposed of, whether all, or some, or how many; nor to whom they were to be disposed of; nor did the letter mention whether they were to be disposed of by way of sale or assignment of lease; and, therefore, all the danger of perjury which the statute was meant to provide against, would be let in to ascertain this agreement.

[* 291.]

Supra.

So, in the case of *Montacute* and *Maxwell* before-mentioned, a letter from Sir George to his lady, written after the marriage, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command, was insisted upon as an evidence under his hand of the agreement before the marriage, which would take the case out of the statute. But the chancellor, as to the latter part of the proposition, said, that the letter consisted only of general expressions; that, indeed, had it recited or mentioned the former agreement, and promised the performance thereof, it had been material.

Having considered the construction of the several parts of the clause in the statute of frauds relative to agreements,

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agreements, the next object * I shall advert to is, the [* 292.] several grounds upon which courts of equity have considered parol agreements binding, notwithstanding this statute. And one ground upon which this equity has been raised is, that though this statute has provided that no agreement on marriage, or for the purchase of lands, shall be good, unless signed by the party to be bound, or some person by him authorized; yet, on all the questions upon a statute against fraud, the end and purpose of making it is considered; which, in this instance, is to prevent frauds and perjuries, and not to vacate bargains fairly and honestly made. Therefore courts of equity considered themselves as unrestrained thereby in the latter cases: because the parties are in conscience bound to perform such agreements, and ought not, in such instances, to be permitted to take advantage of the want of any solemnities, whether imposed by common law or statute: with this view courts of equity have considered agreements, wherein there has been no danger of fraud or perjury, as out of this statute. And, therefore, if, on a bill, filed by either vendor or vendee for a specific performance of a parol agreement, setting forth the substance of it in the bill, the defendant, by his answer, admit the facts as stated in the bill, * this takes the agreement entirely out of [* 293.] the mischief pointed at by the statute; and a court of equity will decree it, because, the defendant confessing the agreement, there can be no danger of perjury from a contrariety of evidence. Besides the agreement is in writing, the answer confessing it.

And if the party himself die, his heir will, it seems, be bound on a bill of revivor; the principle going throughout, and binding the representative equally as the principal.

And, upon this principle, equity will decree an agreement on evidence of its having been confessed by a party to it, although it be denied by his answer. Therefore, where an agreement was proved by one witness only, and positively denied by the defendant's answer, but there was the circumstance of the defendant's having confessed the agreement proved in the cause: the master of the Rolls offered to direct an issue to try the agreement if the defendant desired it; but he declined that, unless his honor would make an order that his answer should be read on the trial, which his honor refused to do, there being circumstances to corroborate

Symondson v. Tweed, Pre. Ch. 374. S. C. Gilb. Rep. Eq. 35. Croyston v. Banes, Pre. Ch. 208. Lord Vaughan v. Morgan, [* 293.] Finch 138. Etvide Hodgson v. Hutchenison, 5 Vin. Abr. 522. Pl. 34. 2 Eq. Ca. Abr. 47. 1 Vez. 441. 3 Atk. 3. 10 Mod. 404. Per Lord Hardwicke, 1 Vez. 222.

Only v. Walker. 3 Atk. 407.

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[* 294.] roborate the evidence of * the single witness. And his honor decreed the agreement to be carried into execution.

And there are cases wherein both courts of law and equity (for the rule is the same in both) will let in proof of parol agreements, as circumstantial evidence to control written ones, to prevent the fraud taking place which would in such cases arise from insisting, that something had got into writing which deprived the party of the benefit of detecting this fraud. Thus the defendant may, on a bill for specific performance of a written agreement, insist upon a subsequent parol agreement between the parties by which the former has been since discharged.

Legal v. Miller,
2 Vez. 229.
Et vide Goman
v. Salisbury,
1 Vern. 240.

Thus where there was an agreement in writing for taking a house at 32*l.* *per annum* to be repaired by the owner, and, it being afterwards discovered that it must be rebuilt, that was done without cancelling the written agreement; but the tenant, apprized of the great expence the owner must incur, agreed by parol, that 8*l.* *per annum* should be added to the 32*l.* which was to have been given in case it had been only repaired: the court, on a bill by the tenant filed on the foot of the * written agreement (notwithstanding it was insisted that the written agreement should speak for itself, and that no evidence could be admitted to contradict it) received evidence of the parol agreement, and thereupon dismissed the bill with costs.

Ibid.

But in the preceding case, the court, being satisfied from the parol evidence, that a specific performance of the written agreement ought not to be decreed, would not, on dismissing the bill, make a decree according to the agreement which the defendant set up; the master of the rolls saying, that it would be very hard upon a defendant, if (when a plaintiff unconscientiously brought him into a court of equity for the specific performance of a written agreement, and the defendant insisted on an agreement different from that the plaintiff set up, and the plaintiff replied to his answer and insisted on his former demand, and went into proof, and then, finding he could not have the decree prayed by his bill, resorted to that which the defendant set up) the court should decree against the defendant.

Another ground, upon which cases have been held to be

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be out of the purview of this * statute is, not so much [* 296.] on the principle of there being no danger of perjury from carrying them into execution, as that the statute ought not to be construed so as to create or promote fraud. And, therefore, where an agreement has been carried partly into execution, and one party has incurred expence in improvements; although a controversy may afterwards arise between the parties as to the precise terms, yet, if they can be made out satisfactorily to the court, the agreement, though resting on parol evidence will be decreed, notwithstanding variety of evidence adduced in such cause: for, in such case, in order to prevent one side from taking advantage of the statute to be guilty of fraud, and thereby pervert its object, a court of equity considers his conscience as bound, and itself as, thereby, clothed with jurisdiction upon the ground of the equity arising from the circumstance of performance on one part; and, upon that foundation, retains the suit notwithstanding the statute, *as not within the purview of it.* Therefore a lessee, in the case of a parol lease ^a of ground for a great number of years, having begun to build, will have his bargain completed. The reason is, that the lease is in part executed on the part of the lessee, * and, therefore, [* 297.] the lessor shall not take advantage of his own fraud, to run away with the improvements made by another.

Pre. Chan. 519. Upon similar principles the registering acts have been considered as not protecting purchasers, with notice of preceding incumbrances not registered, from such preceding incumbrances, although their purchases be registered. First, Because, such statutes, being made to prevent fraud, ought not to be so construed as to encourage it. Secondly. Such statutes are considered as leaving the

subjects to which they apply, open to all equity.

* 2 Eq. Ca. Abr. 48. 16. 5 Vin. Abr. 522. Pl. 38. Et Pre. Ch. 56. 1. Et Fozcroft's case in Dom. Proc. cited Pre. Ch. 519. Gilb. Rep. Eq. 4. et ibid. 11. where said, that the lessor, in this case, when dying declared, that he ought to have made a lease in writing, but the heir told him he should not discompose himself, for he would supply it; whereby, and by other fraudulent means, the lessee was prevented from suing the lessor. Sed vide Floyd v. Buckland, 2 Freem. 258. This point expressly so determined on the ground of performance.

And, under similar circumstances of money laid out in pursuance of a parol promise of a lease, a specific performance was decreed; although the terms were not precisely stipulated between the parties, at the time of the agreement.

Thus where the plaintiff's bill was to have a lease according to the defendant's promise, the plaintiff having laid out money upon the estate intended to be demised: the defendant insisted on the statute, there being no agreement in writing, *nor any certain terms* agreed upon; and averred, that what the plaintiff had laid out was not on lasting improvements, but admitted that the plaintiff had built a stable which cost him 10/. It was proved that the defendant told the plaintiff his word was as good as his bond, and promised the plaintiff

Anonymous, 2 Eq. Ca. Abr. 48. 17. 5 Vin. Abr. 523. 40.

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tiff a lease when he should have renewed his own from his landlord. *Et per curiam*, the defendant is guilty of a fraud, and ought to be punished for it; and a lease was decreed to the plaintiff, though the terms [* 298.] * were *not expressed* by the parties; for then it should be in the plaintiff's election how long he would hold it, and he elects to hold it during the defendant's term at the old rent.

Halfpenny v. Ballet,
2 Vern. 373.
Et vide S. C.
Pre. Chan. 404,
405.

And, upon the same principle, namely, to prevent fraud, the master of the Rolls decreed an agreement and payment of a portion in the case of *Halfpenny and Ballet*. That was a case wherein, on a marriage treated upon between the plaintiff and the defendant's daughter, an agreement was reduced into writing and signed by the plaintiff, and delivered to the defendant to be signed by him, but denied in the defendant's answer to have ever been signed by him, he having torn it, being dissatisfied therewith in some particulars. But his objections not being to any material parts of the agreement, and he having permitted the plaintiff to court his daughter, and the marriage having been afterwards had, and he not having declared his dislike until asked for payment of the portion, and having permitted the young person to live with him, the master of the Rolls decreed a specific performance; considering the defendant's conduct as founded in fraud.

[* 299.]
Wanchford v. Fotherley,
2 Freem. 201.

* So, where the bill was for a portion upon marriage of the plaintiff with the defendant's daughter, it appeared that there was no note or agreement in writing signed by the defendant for the payment of it, but that a letter had been written to the plaintiff by a third person offering a portion, which it was in proof was done by the defendant's consent, and that a treaty for a suitable settlement was had with him; but the matter being long in suspense, the marriage took place in the mean time. The court, although it appeared that the defendant, before the parties went to church, declared he would give them nothing, and the statute of frauds was insisted upon, decreed for the plaintiff; considering the countermand as nothing after the young people's affections were engaged.

And possession, delivered in pursuance of an agreement, is also such a degree of performance, as is sufficient to take a contract out of the statute, although the purchaser has not invested money upon the premises. Because the mischief the statute meant to prevent existed in such agreements only, no part whereof were carried

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carried into execution, and which were set up merely by parol: therefore, * execution on one part has been looked upon as so far conclusive, as to induce the court to decree an execution on the other part, rather than the agreement, so far as it has been already carried into execution, should be destroyed. [* 300.]

Thus, where A. seized of lands, agreed with C. to sell the same to him, and a short note was drawn up of the agreement (but not signed by either party) and, soon after the agreement, C. put in his cattle and made encroachments on A.'s other lands; whereupon A. desired to undo the bargain, but C. refused to consent to that, and then A. sold the land to D. Upon a bill filed by C. for a specific performance, the statute of frauds was pleaded. *Et per curiam*, Inasmuch as possession was delivered according to the agreement, the bargain was executed, and the specific performance was decreed. Butcher v. Stapely, et al. 2 Vern. 363.

So where A. having mortgaged the lands in question to B. for 750*l.* died, leaving an infant his heir, and, it being for the advantage of the infant that the estate should be sold, an act of parliament was procured for that purpose, and a public survey was held for * the sale of it, at which C. bid 1250*l.* for it, but D. bid 1350*l.* and signed the contract. D. soon afterwards died, and then C. offered 1250*l.* again for it, which was accepted and agreed unto; and thereupon conveyances were directed to be made, and possession actually delivered. C. afterwards got an assignment of the mortgage which was ante-dated, and then, pretending that he took possession under the mortgage he filed a bill to compel the infant to redeem or be foreclosed; and there was a cross bill to compel C. to compleat his purchase. And the taking possession under the mortgage being disproved, the simple question was, whether upon the circumstances of this case the agreement, although only by parol, should be carried into execution against C. And the lord keeper decreed that it should, and that C. should proceed in the purchase, in case a good title could be made. Pyke v. Williams, et c contra. 2 Vern. 455. [* 301.]

Again, where a bill was filed to have a discovery of a parol agreement for the sale of copyhold lands, and whether the defendant did not pay 200*l.* part of 2300*l.* being the purchase money, and if the plaintiff did not give the defendant a note acknowledging the receipt of the 200*l.* and promise to make a good Borret v. Gomeferria, Bunbury's Rep. 94. in scaccario. 2 Eq. Ca. Abr. 48. 17.

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[* 302.] * good title, and whether he did not bring his writings before the defendant's counsel who approved of the title, and also to have a specific performance. The defendant pleaded the statute of frauds. But the plea was over-ruled, and it appearing in proof, at the hearing, that there was no fraud, that the lands were worth 2335*l.* that defendant had done several acts of ownership, as ordering in bricks, fishing in ponds, &c. and had made frequent promises; the court decreed for the plaintiff.

Vide *supra*,
et S. C.
1 Vern. 365.
Sed note, the
chancellor
thought that
the purchase of
D. in this case
was a contriv-
ance between
him and A. to
avoid the bar-
gain; so quare?
Pre.Chan. 519.

And, in such cases, the taking possession under the agreement, will be deemed notice to a subsequent purchaser. Thus it was held, in the case of *Butcher* against *Stapely* before-mentioned, that C.'s putting in his cattle and taking possession, was notice to D.

Nor can such agreement, so executed on one part, and followed by an enjoyment accordingly on the other, be so far impeached as to lay the party open to an account for the profits he has received under the enjoyment; because, it was said by the court, that would be much harder than setting aside the agreement at first for want of writing.

[* 303.]
Lady Herbert
v. Earl Powis,
et al. Brown's
Par. Ca. vol. vi.
102.

* And in the case of Lady *Herbert* and the Earl of *Powis* and others, determined in the house of Lords on appeal from a decree of Lord *Northington* an agreement by parol, made by an agent of the earl's with Lady *Herbert*, that his lordship should pay her 200*l.* a year by way of annuity, in consideration that she consented to the appointment of a lady as guardian to her niece Miss *Herbert*, to be named by his lordship, with a view to place her in a situation wherein he might have access to her to pay his addresses, and with a person who in that character would consent to the match, whereby his lordship's title to the *Powis* estate, which was then disputable, being held only under the will of the last marquis, would be settled, she being niece to Lady *Herbert*, and heir at law to the *Powis* estate, was ordered to be carried into execution on his lordship's part; Lady *Herbert* having performed her part of the agreement by consenting to the appointment of the guardian, whereupon the marriage was had, and an end put to all litigation. And such consent, being the compromise of an intended lawsuit, was held to be a good consideration to support a promise in law, whereof the promisee might claim the benefit either by an action at law,
or

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* or a suit in equity, as the nature of the case required. [* 304.]

Again; where, previous to the defendant's marriage, 500*l.* the property of his wife by a former marriage, was agreed to be assigned to trustees for her separate use during coverture, and to be applied after her death to such uses as she should appoint; and after the marriage a draft of an assignment was prepared, and corrections made in the husband's hand-writing; and he suffered her to receive the interest of it to her separate use during the coverture. These circumstances were considered by Lord *Hardwicke* as a part performance, and as taking the agreement out of the statute. His lordship observing that, if the statute were suffered to be pleaded to the discovery even of a parol agreement in such cases, it would be very mischievous.

Cutting down of timber likewise, is a part execution of articles, made on marriage, for settling an estate. Taylor v. Beach. 1 Vez. 297.

Payment of money is, in some cases, considered by the court of Chancery, as a part performance of an agreement. Thus, where * A. having occasion for money, came to a parol agreement, entered into on her behalf by her agent with B. that A. in consideration of

a certain sum to be paid by B. should convey her lands, &c. to him and his heirs, subject to estates for life of C. and D. the purchase money to be applied as then stipulated: and B. in part of the agreement, paid A. several sums of money, for part of which he took her bond, till the agreement could be completed; and thereupon a lease of part of the lands purchased was renewed, *and the life of B.'s son inserted with the approbation of B. according to the agreement*, and then A. died. On a bill to compel a specific performance, filed by a creditor by simple contract against B. and the heir of A. the heir objected, that he was a stranger to the transaction, and that if any such parol agreement had been made, he was not bound thereby, in regard it was not reduced into writing, nor in any sort performed by A. in her life-time. It was sworn positively, that the money had been applied for, and absolutely paid upon the foot of the agreement. And Lord *Hardwicke*,
Sidney v. Sidney, 2 Eq. Ca. Abr. 29. Pl. 37.
Lacoe v. Martins, 3 Atk. 2.
[* 305.]
Gillb. Chan. 231
5 Vin. Abr. 522.
40.

upon

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[* 306.] upon all the * circumstances of the case, decreed a specific performance.

Lord Pengall v. But where A. agreed with B. to make him a lease
 Ross, 2 Eq. Ca. for twenty-one years, of lands rendering rent, B. pay-
 Abr. 46. 12. ing A. 150*l.* fine, and B. paid 100*l.* in part to A.'s
 S. L. Leake v. agent, which A. knew of, and ordered his own agent
 Morrice, 2 Ch. to prepare the lease, but before it was executed, A. re-
 Ca. 135. S. C. pented and refused to grant it; B. having paid 100*l.*
 1 Eq. Ca. Abr. *earnest*, exhibited his bill for a specific performance:
 23, 20. Pre. it was held, that this payment was not such a perfor-
 Chan. 560. mance of the agreement on one part, as warranted the
 court to decree an execution on the other; because a
 parol agreement respecting lands cannot be good,
 within the statute, by giving money *in earnest*; for
 there must be something more than a bare payment on
 the one part, to induce the court to decree a perfor-
 mance on the other part, either by putting it out of
 the parties power to undo the thing, or doing some-
 thing that would be prejudicial to the party performing
 it; but the money was ordered to be refunded.

[* 307.] But it seems to be the better opinion, that * pay-
 Bacon's Abr. 64. ment of money *alone* may be a part performance to take
 et Gilb. Ch. 231. a case out of the statute. But the doubt in such case
 2 Chan. Ca. 36. seems to have been, what shall be a proof of the receipt
 thereof as such. Thus far seems certain; if the defend-
 ant in his answer confesses the receipt of the money *for*
the purpose charged in the bill; or if he denies the receipt
 as in part performance, and it be proved upon him by
 writing, as *by letter under his hand*, or other written
 evidence, he shall be obliged specifically to perform the
 whole agreement, because he has carried it in part into
 execution. But if the defendant confesses the receipt
 of the money, and says that he borrowed it from the
 plaintiff, and that he had it not in execution of that
 agreement, there, he turns the proof of the agreement
 on the plaintiff, and then, it is said, the plaintiff must
 prove the receipt of the money by the defendant for the
 purpose in the bill mentioned, by some written agree-
 ment.

However, this appears to be in some degree questi-
 onable; because, in such case, the parol evidence is
 applied to the act of receiving, which is a consequence
 of and collateral to the act of contracting, and conse-
 quently

Vide Gilb. Ch.
 232. where
 there is a pas-
 sage which,

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quently * affords a further evidence of the bargain, [* 308.]
 than the parol proof of such bargain only; namely, an act done in pursuance of it, which furnishes a distinct fact, that appears to be the proper subject of discussion before a jury, who, in such case, would be competent judges of the credit of the parties, and might, by their verdict, decide, whether the payment of money was in part performance or not; and thereby determine, whether the case was or was not within the exceptions taken out of the statute. *Sed quare.*

And in cases of earnest paid, an action of law may be brought, and damages recovered for non-performance, although there be no remedy in equity. The reason of which is, that where equity assists the common law, and enforces the performance of the agreement in specie, it does it upon important reasons; namely, where otherwise there would be a great burthen and penalty upon the party, if having performed part, by which he himself has a loss, and the other a benefit, he should not have a reciprocal performance.

And an agreement by parol, part * performed, will be decreed against the heir of the vendor under it. [* 309.]

But as the principle which governs the court is, that the act, done in part performance, is presumptive evidence that the agreement was really made, it must be of such a nature, as the court is satisfied would not have been done, *unless on account of the agreement.* And, therefore, where a lessee agreed by parol to take a lease for a term of years certain, and continued possession on the credit thereof; there being no writings to make out the agreement, it was held to be directly within the statute.

Marriage alone is not considered, in equity, as part performance of an agreement made between the parties themselves, although it is considered as such to bind a third person: as in the case mentioned before of a letter written by a father, promising to give such a fortune with his daughter to any one who should marry her, in which case a man, who marries on the encouragement of this letter, shall recover; because the agreement is executed on his part as far as it can be, and can never

though obscurely written, seems to warrant this observation.

Lacon v. Mertins, supra. Et vide Hawkes v. Hawkes, Finch 300. Sanfum v. Butter, 1 Bac. Abr. 74. Per Lord Hardw. 3 Att. 4. Smith v. Turner, cited Pre. Chan. 561. et vide Hole et White, cited Brown's Rep. Ch. 409.

Vid. Viscountess Montacute v. Maxwell, supra Sanfum v. Butter, 1 Bac. Abr. 74.

Pre. Ch. 561. et vid. Brownsmith v. Gilborne, be Strange. 738.

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[* 310.] be undone after. The reason why * marriage alone is not looked upon as an execution of the one side between the parties, so as to take such case out of the statute, seems to be, that, if it were, the statute would be entirely evaded; for all promises of this kind suppose a marriage had or to be had.

Lamas v. Bayly,
2 Vern. 627. fed
vide 5 Vin. Abr.
521. Pl. 32. et
2 Eq. Ca. Abr.
45. 10. both
which seem to
be the same case
as reported in
Vernon, and
rest the chan-
cellor's decree
on the ground,
that there was
no absolute nor
positive agree-
ment, the
words being
ambiguous and
uncertain; and
not on the
ground that the
forbearing by

[* 311.]
agreement to
do an act might
not be a part
performance,
and raise as
strong an equi-
ty to have the
benefit stipu-
lated in return,
as an act done.

*Whaley v. Ba-
genall*,
6 Brown's Par.
Ca. 45.

And the fact of one party purchasing, desisting from his purchase in favor of another party on certain conditions stipulated, is not a part performance to take an agreement in favor of the party desisting, as to part of the lands purchased, out of the statute; for, where A. being about to purchase a toft of ground of B. and C. being also treating for the same premisses, met together; and it was proposed and agreed, that A. should desist and permit C. to purchase, he agreeing to let A. have, at a proportionable price, that part of the ground he desired; and thereupon A. desisted, and B. completed his purchase; and afterwards ~~As~~ refused to perform the agreement: on a bill filed by A. upon the ground of the agreement's being in part executed, by his desisting from prosecuting his purchase, a specific performance was decreed at the Rolls: but on appeal to the chancellor, the decree was reversed.

* Again; on a bill filed in the court of Chancery in *Ireland*, for specific execution of a parol agreement for the purchase of an estate, proof of the delivery of a rent-roll to the purchaser, altered and dated by the seller in his own hand-writing; of his delivering the deeds to the purchaser's agent, to be compared with the rent-roll, and laying an abstract of his title, and a case thereupon, before counsel, in which it was stated, that the purchaser had agreed with the seller for the purchase of the lands at twenty-one years purchase; of his giving the purchaser a list of his debts which affected the estates, and authorizing him to apply to his creditors, to several of whom, and to other persons, the seller was charged to have written letters himself, informing them that he had agreed with the purchaser to sell; and of his afterwards sending to the tenants to treat with A. as owner of the estate, for renewal of leases, and to cut down timber; and to prevent the effect of an *elegit* against him, of his producing evidence before a jury that such agreement and purchase had been made, was held not to be sufficient, on the ground of a part execution, to take the agreement out of the statute of frauds: but the bill was ordered to be dismissed,

and

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and that * order of dismissal affirmed on appeal to the [* 312.]
house of Lords.

And possession, under a parol agreement, of how- Ireland v. Riddle
ever long standing, will not be a ground to establish it, ¹ Atk. 626.
if it appear that the persons who made such agreement
had not a right to contract. As if an agreement for
partition be made by two husbands, of land belonging
to their wives, without the consent of the wives;
for they cannot thereby bind the inheritance of their
wives.

**Of Contracts or Agreements, considered
as such in Equity, arising out of In-
struments, &c. having a different Effect
at Law.**

EQUITY, which adverts to the substantial object of all contracts, independant of the forms which they assume, gives effect to the intent of the parties, by considering their acts as evidence of such a contract or agreement, as will produce what is stipulated. Concerning which two things are to be considered. First, What, in the view of a court of equity, amounts to a contract or agreement. Secondly, How it may be proved in equity.

First, It is clear that any kind of written contract, if it expresse the intent of the parties, to stipulate with a view to some particular thing collateral to the contract itself, will, in equity, amount to an agreement respecting * that thing; although, in form, it assume a different character.

[* 314.]

Anonym.
Moseley 39.
1 Strange,
2 Vez. 373:
10 Mod. 517,
518. 9 Mod 62.

Thus where the condition of a bond was, " in consideration of so much money in hand paid, to convey and assure certain lands ;" the master of the Rolls declared, that bonds of this nature were always considered, *in equity*, as articles of agreement, and decreed the condition to be specifically performed.

Aston v. Pierce,
2 Vern. 480.

So where A. on his marriage agreed to leave B. his wife 1000*l.* if she survived him ; and the drawing the marriage agreement was left to the parson of the parish, who made a bond from A. to B. in 2000*l.* conditioned to leave her 1000*l.* if she survived him : the question was, whether this bond, although released at law by the intermarriage, did not subsist as an agreement in equity, and entitle the plaintiff to a satisfaction out of the real and personal estate of A. And it was held that it did subsist, and bound both the real and personal estate.

And the construction will uniformly be the same in equity, although the instrument has become void by some matter *ex post facto*.

Thus

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* Thus where A. lent B. seventy pounds, and for his security took only a warrant of attorney to confess a judgment in ejectment of three closes upon a feigned demise for twenty years. It was held, after the death of B. that this was a defective *legal* security, but that it amounted to a *good* agreement, in equity, to charge the land; and it was decreed accordingly against the heir. [* 315.]
Dale v. Smithwick, 2 Vern. 151.

Again, if two persons give a joint bond, and one of them (the condition being forfeited by the day being past) pay off the money, and put the bond in suit against the other in the name of the obligee: the other obligor may, *on the act of parliament for the amendment of the law*, plead, that his co-obligor has paid the principal and interest on the bond before bringing the action, and this will be a discharge of the bond. But, although the bond be discharged at law, yet *equity* will, upon a bill to compel the co-obligor to make contribution, or to pay the whole, if he were liable to the whole, either direct that he shall pay the money to the other obligor, or it will at least restrain him from pleading payment by the other obligor, who is suing him at law. And the reason the court goes upon is, that * the bond is considered as an agreement in writing; and, therefore, though the obligation and penalty is gone by the legal demand being gone, yet the condition, taking it altogether, is considered, in equity, as an agreement under hand and seal to pay the money. [* 316.]

So where a feme sole, seised of land and designing to marry, agreed with her intended husband, that she, upon the marriage, would convey her lands to him and his heirs; and for that purpose she, previous to the marriage, gave a bond in 2000*l.* penalty to the intended husband, conditioned, that in case the marriage took effect, she would convey her lands to him and his heirs; the marriage was had; the husband enjoyed during his life; and, on his death, his heir brought a bill in Chancery against the heir of the wife to compel him to convey the lands of the wife to the heir of the husband. It was objected that the bond became void by the intermarriage. *Sed per curiam*, The impropriety of the security, or the inaccurate wording of it, is not material; for it is sufficient that the bond is a *written evidence* of the agreement of the parties, that the husband, in consideration of marriage, should have the land as her portion. Cannel v. Buckle, 2 P. Will. 243.

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[* 317.]
 Watkins v.
 Watkins,
 2 Atk. 97.

* So where a woman, having a considerable fortune, upon her marriage trusted her intended husband to draw up a bond to secure 1700*l.* for her, in case she should survive him; Lord *Hardwicke* said, that the court in a case of this sort would interpose, and make the agreement according to the intention of the parties; and though the bond might be void in law, yet that court would establish it in favor of the woman. And, for that purpose, his lordship declared the bond to be an imposition, and directed her personal estate to be placed out on security, the interest to be appropriated during the joint lives of the husband and wife as in the decree mentioned; and, in case the husband died in the life-time of the wife, then the 1700*l.* to be paid to the wife as agreed upon in the bond.

L. Raym. 683.
 3 Keb. 304.
 2 Vern. 540,
 594. 3 Chan.
 Rep. 40. Chan.
 Ca. 232. 2 P.
 Will. 608.

So an assignment of a chose in action, as a *bond*, or *the like*, which in law is not assignable, is valid in equity whether it be entered into with or without consideration. For a court of equity proceeds upon the principle, that the assignment, although not effectual as such at law, the bond not being assignable in point of interest, amounts, nevertheless, to a covenant or agreement, that the assignee shall * receive the money to his own use; which covenant or agreement, that court will carry into specific execution.

[* 318.]
 Vide 1. Vez.
 445, 450.
 3 P. Will. 188.

Upon the same principle it is held, that, although an award or submission to arbitration is distinguishable from an agreement, inasmuch as the former cannot be supplied by interposition and act of a court of equity; because, generally, in those cases, the time is conditional, namely, so as a determination be made by such a day, and also, therein, matters are left to the judgment of the arbitrators; yet an acceptance of any thing under it, is evidence, in equity, of an agreement to perform it.

Hall v. Hardy,
 3 P. Will. 187.
 Et vide 1 Vez.
 539.

Thus where one accepted part of money, awarded on a bond to stand to the award of arbitrators touching a matter in dispute, he was considered as having undertaken to perform the award; he having thereby consented to it, and made it his own agreement for a valuable consideration, namely, the money paid him. And upon this ground a specific execution of the award was decreed; although his honor said that there was, unless in very particular circumstances, no instance of
 a bill

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a bill * having been brought for a performance of an [* 319.] award.

So where A. and B. had submitted to an arbitration by bond, and an award was made (not binding by form of law) by which A. was to pay B. 900*l.* and to seal a release to him, and B. was to assign several securities he had from A. and A. sold some lands to raise the 900*l.* expecting that B. would receive it, as he had given him intimation he would, and tendered him the 900*l.* and a release executed: the court, though there was no other execution of the award on A.'s part, and though it was extrajudicial and not good in strictness of law, decreed that it should be performed in specie.

No-ton v. Mas-
call, 2 Vern. 24.

Secondly, Having shewn what amounts to an agreement in equity, I shall now proceed to point out, how an agreement may be made out in equity.

An agreement may be made out in equity, First, By proof of a positive agreement in terms: as by the production of an agreement in writing to do, or omit doing, a * particular thing; or, by evidence of a parol [* 320.] agreement of the same nature in part performed.

Secondly, by proving circumstances, from the nature of which equity will infer an agreement.

The cases preceding, namely, those that shew what amounts to an agreement in equity, nearly demonstrate the principles which courts of equity have adopted as to proof of the circumstances from whence they infer such agreements; for there is little, except verbal difference, between the proof of an agreement, and the circumstances which render it an agreement; for, the circumstances which prove it such, constitute it to be so. But this head of our enquiry may be further illustrated by the following cases.

If a man grant a rent-charge out of a bishop's *Gillb. Chan.* lease, and convey it by way of demise and re-demise, 244.

so that the lease is re-demised subject to the rent-charge; a court of equity will, if the grantor agree for the renewal of the lease, compel the grantee to join the grantor, the latter undertaking to convey to the

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grantee

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[* 321.] grantee * the additional lives in the same manner as before for the security of the rent charge. And it was the opinion of the court, likewise (in the case alluded to by *Baron Gilbert*, that the grantee might have compelled the grantor to have renewed, if there had been a failure of lives or fluxion of time; because the grantee of the annuity might have had a writ of annuity, and thereby have continued the payment during his life, if he had not resorted to the lands: and, therefore, when he did resort to the lands, he should have all remedy that could be obtained to make them a security to him during his life in all events; the circumstances of the contract warranting a conclusion, that such was the intent of the contracting parties.

But it seems doubtful, whether the court would have compelled the grantor to renew, if the bishop had refused on the common terms; for if the bishop had refused to renew on the common terms, it would have been tantamount to an absolute refusal, and the grantee must have been contented with the security of the lives in being.

[* 322.]
Palket v.
Serjeant, et al.
Finch. 147.

Again, where A. upon a treaty of marriage * between B. his nephew and C. made proposals in writing to C.'s father, by which A. promised and agreed; that if the marriage took effect, and 2500*l.* were paid, or secured to be paid, for her portion, he would settle 200*l.* per annum out of certain tythes and lands for a present maintenance for B. and C. and for her jointure, if she survived; and that he would settle an estate in fee of all other his messuages and lands, being of the value of 700*l.* yearly, and also assign over and settle 2000*l.* part of the 2500*l.* upon his nephew for his further maintenance after A.'s death; this marriage did not take effect. Afterwards there was another treaty of marriage between B. and S. and A. being acquainted therewith, he, to induce this marriage, sent the before-mentioned proposals in writing to be communicated to the executors of S.'s mother; and by another writing under his hand, which he transmitted therewith, promised and agreed that, if the marriage took effect, he would make a settlement according to the former proposals, with this addition, that although formerly he had demanded 1500*l.* to be paid down, and security for the remaining 1000*l.* he would then be contented to stay for the whole, so that it was secured to be paid in some convenient

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convenient time * agreed upon. No answer was re- [* 323.]
 turned to these proposals; but B. was admitted, and
 the marriage took place. Afterwards A. died. And,
 on a bill exhibited against his representatives by B. for
 a specific performance, it was adjudged by the lord
 keeper, that, when A. sent proposals, and desired to
 have his nephew admitted a suitor to S. although no
 answer was returned to A. yet the acceptance of the pro-
 posals by the friends of S. and the admission of B. as a
 suitor, upon which the marriage did ensue, amounted
 in equity to an agreement executed, and ought to be
 performed on all sides.

Thirdly, An agreement may be made out in equity,
 by proving an instrument, from the nature of which
 equity will infer an agreement.

Thus where A. seised of a copyhold estate, and in- Parks v. Wil-
 tending that his sister, who was his heir at law, should son, 10 Mod.
 not have his land, but that her son should have it, re- 515. 2 Eq. Ca.
 solved to surrender it to the use of his will, and devise Abr. 22. Pl. 20.
 it to him: but a surrender not being practicable by rea- Et vide 1 Eq.
 son of some accident, he prevailed on his sister to give Ca. Abr. 18, 8.
 a bond to him, that she * would, at any time, upon [* 324.]
 the payment of 200*l.* and upon the request of her son, 9 Mod. 62.
 surrender the estate to him; and then A. died. On a
 bill filed against the representatives of his sister, praying
 a decree for a surrender pursuant to the condition of the
 bond, it was so decreed by Lord *Parker*, chancellor;
 his lordship saying, it was plain from the nature of the
 transaction, that it was the fixed intention of A. that,
 one way or other, his nephew should have the lands.
 Not being able to surrender them, he had recourse to
 this bond, as the best method to secure them to him;
 so that this bond was not to be considered as something
 given in lieu of the land, but as another medium of
 securing the land to him. And, on the part of the
 mother, it amounted plainly to an agreement that the
 son should have the land.

And where there are plain footsteps of a further
 agreement, which must have been entered into con-
 comitant with a power to sell a real estate, but which
 is not forthcoming, although, without inferring it,
 the instruments that are produced are unintelligible,
 and the language of them absurd; a court of
 equity, to uphold the intention and meaning of the
 parties

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[* 325.] * parties in the matter of a trust, will support what is wanted by intendment, and will presume that, among the contents of the agreement of which such strong traces are found, there were those stipulations which are absolutely necessary to give effect to the true and evident meaning of the parties. *Ex. gratia.* A court of equity, from provisions in a subsequent instrument, which plainly evinced that the money arising by sale of land was to be invested in the purchase of other lands to be settled to trusts, similar to those to which the lands sold were limited, inferred an *intermediate* agreement or article, for laying out the money, arising from the sale, in that manner.

Vide Newton
v. Newton, et
al. 7 Brown's
Par. Ca. 21.

And a court of equity will, from a subsequent transaction, raise an agreement *accessory* to a *precedent* transaction, where the circumstances warrant such an inference, and it is necessary, in order to do justice between parties.

Attor. Gen. v. Thus where A. being, on his marriage with a daughter of B., to receive a large portion with her, agreed that it should be settled for her benefit for life, and, if there were no * children, then on himself.

[* 326.] Afterwards, on the death of a sister, an accession of fortune came to B. to arise by sale of her father's estate, which was vested in trustees, who were to raise certain sums of money out of the estate, and afterwards to divide the residue among his three daughters. The wife of A. joined in levying a fine for sale of this estate. D. a trustee in the marriage articles, and who had married the third daughter, acted in the sale, and received the whole purchase money. A. gave a receipt to D. for his part of the purchase money paid for the estate, *which he thereby promised and agreed* to lay out pursuant to the trust reposed in D. Then A. died, having devised his real and personal estate away from his wife. And one question, upon a cross bill filed by her, was, whether her share of the lands, which came to her on the death of her sister, as well as the lands and tenements, purchased with the share she was entitled to out of her father's estate (which was agreed by the articles to be settled) should be bound by the marriage articles. And on behalf of the husband it was argued, that she was not entitled to have the benefit of the estate arising from her sister's death, by its being settled pursuant

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suant to the articles; * because it was not within the [* 327]
 articles, and there was not sufficient proof of any such
 agreement extending to that estate, as would bind those
 standing in the place of the husband: that the wife had
 levied a fine before it came into the hands of the trust-
 tee, and then the money, coming in lieu of the estate,
 was absolutely the husband's, and the court would not
 have suffered the person, into whose hands it came, to
 have retained it, and said, that a settlement should be
 made on the wife. But Lord *Hardwicke* was of opini-
 on, that the note was sufficient to bind the testator, his
 representatives and the claimants under his will, to a
 performance of what was there agreed to; for a man
 might, as between himself and his wife, make an agree-
 ment or declaration of trust in his life-time, which,
 though not for valuable consideration, should take
 effect against his executors and administrators, or those
 claiming voluntarily and in representation under him
 after his death. Then, as to the construction and
 extent of the note, *his lordship* thought that it was a
 reasonable act for him to do, and he said, that it had
 been truly insisted, on behalf of the wife, that on the
 husband's application for the money, the court would
 undoubtedly have ordered a * further settlement. If, [* 328.]
 then, the parties did not come into court, but acted
 among themselves, and the husband had agreed to do
 that, which the court would have directed, had the
 wife insisted on it in a proper suit, it should have its
 full effect. Though it did not appear in the cause,
 that the wife had levied a fine before this money came
 into the hands of the trustee, as it had been said; yet,
 if she had done so, that must have been to satisfy the
 purchaser, as she was married: his lordship would not
 divide one act from the other, but would take all as
 one transaction; and, he said, that this note, though sub-
 sequent, was an evidence of what was the agreement and
 intent, viz. that this money should be laid out in the
 purchase of land to be settled to the same uses. The
 circumstance warranted that construction. The trust-
 tee in the marriage articles being the proper person to
 intervene and receive the money arising by sale of that
 other share, and to see the articles performed for her
 benefit, he had received the whole. The husband
 coming to receive it out of his hands, had received it
 on such a promise, which was an evidence of the terms
 on which the money was paid to him, and of the agree-
 ment

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[* 329.] ment and * intent on which the wife joined in the fine for sale of this estate. It was reasonable, and what the court would have obliged him to, had he come before it; *for that was the distinction*. If a husband could lay hold of the wife's estate without aid of a court of equity, the court would not compel him to settle it, as they would where he could not come at it without such aid, which was the present case. The sum was particularly ascertained, and included both shares, as well that which arose on her sister's share, as her original share. And the promise was to lay out the whole of that sum, which therefore his lordship was of opinion must be laid out pursuant to the trust.

Of the Consideration necessary to support a Contract or Agreement.

A Consideration is the material cause of a contract or agreement; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties.

We have seen that there are two ways of making contracts or agreements. The one by parol, and the other by writing. Now, since words are frequently spoken by men unadvisedly and without due deliberation, the law will not bind a man to an executory contract entered into by words only, if it be not founded on a good or valuable consideration. And, therefore, if one man promise or covenant by parol to give another man 20*l.* to make his (the latter's) house *de novo*; or towards his losses by fire, or the like; here the latter shall not have an action against the former for the 20*l.*

* So if one buy of me an house, or other thing for [* 331.] money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered; here no action lies for the money, or the thing sold, but the owner may sell it to another if he will: for such promises or contracts are deemed *nuda pacta*, there being no consideration or cause for them, but the covenants themselves, which will not yield an action: and this agrees with the definition of *nudum pactum*, as given by the civilians, namely, *nudum pactum est ubi nulla subest causa præter conventionem*. 11 H. 4. 31. a.
Plowd. 302.
309.

Therefore where a carpenter, by parol without writing, undertook to build a new house, and for the not doing it the party brought an action or covenant against the carpenter, and it did not appear that he was to have any thing for building the house; it was adjudged, that he should take nothing by his writ. Dyer 30 b. 3; 6.
b. Ficz. debt.
126. 17 E. 4 4.

So if a man by word of mouth, or by writing sealed and *not delivered*, sell me his horse, or any other thing, and I give him or promise him nothing for it; the contract is void, and the property in the thing sold is not altered thereby.

But

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[* 332.] * But it is otherwise if contracts or agreements be by deed under seal and delivered, because there is then more time for deliberation; for when a man passes a thing by deed so constituted, there is first the determination of the will to do it, which is one part of deliberation; then the party causes it to be written, which is another part of deliberation; and, lastly, he *delivers* the writing as his deed, which is the consummation of his resolution. And by the ceremony of the *delivery* of the deed from him that makes it to him to whom it is made, the former, in consideration of law, gives his assent freely and deliberately to part with the thing contained in the deed, and that it should pass from him to the other. Therefore, on account of this deliberation in the making of deeds, they are in law conclusive upon the party executing them, and bind him, without examining upon what cause or consideration they were founded. Consequently, if I by deed, bond, or covenant, bind myself to give you 20*l.* to make your hall *de novo*, here you shall have an action upon this deed, bond, or covenant, and the *cause* or *consideration* for it is not material; for, there is a sufficient consideration apparent, namely, the deliberate will of the party that made the deed. * And the law would have been the same in the case of the carpenter before-mentioned, if the contract had been by specialty. And, therefore, it is, that where a contract or agreement is by deed, the cause or consideration is not enquirable into on an action upon it; but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound: for every deed importing in itself a consideration, namely, the will of him who made it: a contract or agreement, where either of them is by deed, is never considered as *nudum pactum*. Thus in an action of debt upon an obligation, the consideration upon which the party gave the bond is not, at law, enquired into, because it is sufficient to say, that it was the obligor's will to make the deed.

[* 333.]
Plowd. 309.

3 Barr. 1663.

But, Mr. Justice *Wilmot*, in the case of *Pillans* and *Rose* against *Van Microp* and *Hopkins*, went so far as to give it as his opinion, that the putting a contract into writing would alone be sufficient to take it out of the rule as to *nude pacts*; upon the ground that this single circumstance would be a guard against surprize, which was the occasion of that rule: it having been held by the best authorities, that, according to the law of nature, the
want

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want of * consideration was no radical defect in a contract, if it were entered into upon deliberation and reflection; for, in that case, it would be morally good, and only require ascertainment. And Lord *Mansfield* inclined to the same opinion. But there being other principles upon which the case in question might be determined, the court avoided this point. [* 334.]

I shall, therefore, offer to the reader some observations thereupon.

The maxim, "*quod ex nudo pacto non oritur actio*," is derived from the civil law. Cod. lib. 3. Pl.
10. lib. 5 tit.
14. 1.

The *Roman* law divided conventions or agreements among men into two kinds; namely, Promises and Contracts. A promise and a contract differed in this respect simply; the former proceeded from the promiser alone who preferred it, and did not bind until acceptance by the promisee, so that the promiser till then was, at any time, at liberty to retract. A contract was the consent of two or more persons to something to be given or done. It followed of course, that a promise *accepted* immediately became a contract; for, then, there was the assent of two persons to the thing * promised; viz. one to perform, and the other to receive. [* 335.]

Contracts were again divided by the civilians into Nominate and Innominate.

Nominate contracts were so called, merely on account of their having had particular forms of actions assigned to them, from their frequency and general intelligibility. Of this description was letting, hiring, partnership, commission, &c.

Innominate contracts were such as, being more rare, and not of the same defined and certain nature, the law had not provided any express or peculiar form of action to enforce, but had left them open to such suit as was best adopted to the occasion, which was called an action in prescribed terms; and seems to have been analogous to our action on the case, as distinguished from actions of debt, detainue, *ejectione firmæ*, or the like: such actions in prescribed terms not being distinguished by any specific names, but delineated by circuitry and periphrase: as *do ut des*. I give you this that you may give me that; which was where one gave money or goods

on

Vide 2 Blackst.
Comm. 444.

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[* 336.] * on a contract that he should be paid money or goods for them. Of this kind were all loans of money upon bond or promise of repayment; and all sales of goods, in which there was either an express contract to pay so much for them, or else the law implied a contract, to pay so much as they were worth. Or *facio ut facias*, I do *this* for you, that you may do that for me; this was where one agreed with another to do his work for him, if he would do the work of the former in return; or to do any other positive act on both sides; or to forbear on one side in consideration of something done on the other. As that in consideration that A. the tenant would repair his house, B. the landlord would not sue him for waste. Or it might have been for mutual forbearance on both sides; as that in consideration that A. would not trade to *Lisbon*, B. would not trade to *Marseilles*. Or *facio ut des*: I do this for you that you may give me that. As where a man agreed to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value upon it. Thus where a servant hired himself to his master, for certain wages, or an agreed sum, here the servant was held * to contract to do his service, in order to earn that specific sum; otherwise if he had been hired generally, for then he was under an implied contract to perform the service for what it should be reasonably worth. Or *do ut facias*, I give you *this* that you may do *that*. As where one agrees with a servant to give him such wages upon his performing such work. These innominate contracts were all included by the civil law under the general term of *Pacta*.

Pacta were by them again divided into *pacta* with a consideration or cause; and *pacta* wanting a consideration or cause. The former included all innominate contracts where something was to be given or performed, or, *vice versa*, for a consideration or cause assigned: and for these, as we have observed, an action was given in prescribed terms; for if any one by agreement effected any thing (whether that consisted in doing something, or delivering something, or in omitting, or withholding something) *hec animo*, that another in his turn should do something, or deliver something to him, or, *vice versa*; the *Roman* law did not permit him, in whole favor the thing executed was delivered, or the like, to be

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be deficient in performing what * was stipulated on his part, but compelled him to performance. So that if there were a cause or consideration *facti vel traditionis*, a correspondent obligation or pact arose. [* 338]

But pacts which wanted a cause or consideration, by a positive law of the *Romans*, produced no action in the civil forum, unless in cases of sale, which were solemnly ratified, according to a form prescribed, when they were called "*Stipulations*," from the word "*Stipula*," a straw, in allusion to the circumstance, that in such cases a straw was given to the purchaser in sign of a real delivery. And such contracts or pacts, as were innominate in respect of their having *no particular form of action assigned to them*, and were entered into without a cause or consideration moving from the party to be benefited, were, in respect of those circumstances, called *Nuda Pacta*, or mere Naked Pacts.

It may further be observed, that stipulations were anciently performed at *Rome* with abundance of ceremonies; the first whereof was, that one party should interrogate, and the other answer to give his consent and oblige himself. Thus, "*Quod inter nos * convenit, hoc te dare facere spondes, spondeo.*" So that by the ancient *Roman* law, stipulations differed from promises and pacts, inasmuch as the former might have been made in simple and ordinary language; the latter only in prescribed and solemn language. The former might have been made by writing between persons absent; the latter by words only and between persons present. [* 339]

So, likewise, among the ancient *Romans*, all voluntary nominate contracts were written either by the parties themselves, or by one of the witnesses, or by a domestic secretary of one of the parties whom they called a Notary, but who was no public person as among us; and the contract, when finished, was carried to a magistrate, who gave it a public authority by receiving it *inter acta* under his jurisdiction, giving each of the parties a copy thereof under his seal.

So that it seems, in both instances, viz. as well in the case of voluntary contracts, as that of stipulations, in order to give effect to the transaction, it was necessary that it should be *solemnly confirmed and ratified in the presence*

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[* 340.] * *presence of proper persons according to the rules prescribed by law, or it had no validity.*

Now it seems reasonable to conjecture, that, when this maxim of the *Roman law*, "*quod ex nudo pacto non oritur actio*," was adopted and received into our system, it was accepted in its full extent; our law not recognizing any ceremonies analogous to a stipulation, which seems to have been, not the creation, but the ratification of a promise or contract in form before a magistrate.

3 Blackst.
Comm. 157.

Et vide 1 Chan.
Rep. 157. 1 Eq.
Ca. Abr. 84. A.
Pl 1. 2 Hard.
200.

Indeed Sir *William Blackstone* observes, that the rule "*quod ex nudo pacto non oritur actio*," does not hold in some cases, where a promise is authentically proved by written documents; and instances the cases of a voluntary bond and of a note of hand. But the former of these instances turn upon the ground, that it is an instrument under *seal* and *delivered*, which binds the parties and alters their property, though there be no consideration; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting by delivery: and the latter seems to me, so far as it applies, to be a * case of a distinct species, and not an exception out of this rule. For as long as a note of hand is confined to the parties who fabricate it, the want of consideration is a clear bar to recovering any thing upon it, upon the ground that it is *nudum pactum*. And when third persons become interested in it, the reason why it is not open to the same objection is, that, after it is negotiated, its operation is governed by the same law as a bill of exchange, which is the law merchant; and that is founded upon the law of nature and nations, in which the want of a consideration is no *essential* defect in a contract, as it is in the civil law.

[* 341.]

Vide 3 & 4 Ann.
c. 9.

Vide these
cases, and the
exceptions to
them, infra.

If the observations, already offered, were not sufficient to shew, that putting a *nude* contract into writing *simply*, will not so far alter its nature as to supply the want of a consideration, and render it valid without that requisite; the uniform practice of the court of Chancery in refusing, unless under particular circumstances, to aid a covenant *under seal*, if merely voluntary, seems to me to furnish conviction upon the subject; for the principle upon which that court withholds its interposition in these cases is, that, on such covenants,

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* covenants, nominal damages only can be obtained at [* 342.] law; and therefore equity, which follows the law, will not give a more substantial relief. Then, if our law, even in cases of covenants under seal, refuses its substantial aid to the parties, either at law or in equity, claiming under a voluntary contract, though executed with all possible solemnity, accompanied with a DELIVERY, and under *seal*; which are forms as solemn and notorious as those used in a stipulation among the *Romans*, *a fortiori*, will it refuse any assistance to enforce a voluntary contract, that wants *every* of these ceremonies, *except that of being written*.

Having submitted to the reader the foregoing observations upon the subject of *nude* agreements, I shall now recall his attention to that of the cause, or consideration upon which a contract may be supported. Dr. and Stur-
dent, lib. 2.
cap. 24.

And it is to be observed, that such a *cause* or *consideration* may arise and be created in two ways:

First, by some act to be done by the one party, for the benefit of the other party.

* And any thing, however trifling, to be done by [* 343.] the plaintiff, will be a consideration sufficient whereon to ground an action. As if A. demises certain lands to B. rendering rent, and B. assigns the same to D. and after the assignment rent become due; and D. in consideration that A. will shew him a deed by which it may appear that such rent is due, assumes and promises to A. forthwith to pay the same: if A. shews D. the indenture of lease, by which it appears that such rent is due, A. shall have an action upon this promise against D. the shewing the deed being a sufficient consideration. Sir Anthony
Sturly v. Albany,
Cro. Eliz.
67, 150. Cro.
Car. 70.

So where G. brought an action of assumpsit against R. and declared that, whereas T. was in debt to G. and C. T. appointed R. and delivered to him 50*l.* to pay it to G. in part payment of his debt; upon which G. came to R. and demanded his 50*l.* and he answered that he had occasion for it, and was not at leisure, but if he would come such a day, he would pay him; at which day he came, and the other refused to pay him. *Per Popham et Yelverton*, here is another consideration besides the debt: the creditor is to come to the house Dyer 272. Pl.
31. note 31.

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[* 344] * house of the defendant to fetch the money. Judgment for the plaintiff.

1 Roll Abr. 22. Secondly, A consideration may arise or be created, Pl. 23. by doing or permitting somewhat to be done to the prejudice or loss of one of the parties. So that it is not absolutely necessary that the consideration for a contract imports some gain to him that makes the contract; but it is sufficient that the party, in whose favor the contract is made, foregoes some advantage or benefit which otherwise he might have taken or had, or suffers some loss in consequence of placing his confidence in another's undertaking: Thus, if a carpenter promise to repair my house before a certain day, and he does not do it, by which my house falls, I may have an action on the case against him.

✓ 19 H. 6. 49. So, where A. brought an assumpsit against B. and Lane v. Mal- shewed that W. B. father of B. deceased, was indebted lory, Hob. 4. 5. unto A. in 200*l.* and that C. and D. were bound unto S. C. Cro. J. W. B. by two statutes staple in 200*l.* and that W. B. 342. delivered those statutes unto A. that he might thereby [* 345] be satisfied the debt due unto him * from W. B. and that B. pretending to be executor to his father, in consideration that A. at his instance, would deliver unto him the said statutes, promised to pay him 50*l.* at one day, and 50*l.* at another; and averred, that he delivered the statutes, and that B. paid him 40*l.* of the first 50*l.* and the rest he had not paid; and A. had judgment: the judgment on a writ of error brought, was affirmed. For, though it did not appear that B. was, but only that he pretended to be, executor, and so *could make no profit of the estate*; yet, because the statutes were delivered to A. with intent to procure him satisfaction so as he might *cancel* them, or *take composition* for them: and that A. at the instance of B. and in hope of his promise, did *deliver them out*, and *deprived himself of that means*, it was held a sufficient consideration.

Dyer 272. Pl. So, on an action on the case sur assumpsit against S. 31 in note, et there was an agreement between A. and B. that A. vide Cro. Eliz. should have a lease of B. with divers covenants. At 63. the time appointed for sealing it A. refused, on account of inserting a new covenant respecting reparations. Upon which S. standing by, took upon himself that if A. would seal, *he* would make the reparations.

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* tions. And it was adjudged a *good* consideration to [* 346.] support the action against S. although the sealing the deed was no advantage to him.

So, where D. an attorney brought an action on the case against A. executor of B. and counted, that, Bidwell v. Catton, Hob. 216. et vide Cro. Eliz. 74. 75, 849, 881. whereas he had in *Michaelmas* term, 14 Jac. prosecuted an attachment of privilege against B. returnable in *Hilary* term, B. knowing of it, in consideration that at B.'s request D. would forbear to prosecute the said writ any further against B. he (B) did promise to pay him 50*l.* and then avers, &c. After a verdict, it was moved in arrest of judgment, first, that it was not alleged, that the plaintiff had any just cause of action. Secondly, That this action still remained. But the court *nevertheless* gave judgment against A.: for, first, Suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit. Secondly, Though this did not require a discharge of the action, yet it required a loss of the writ, and a delay of the suit, which was both benefit to the one, and a loss to the other. And the court held, that an action of debt would have lain against the defendant's testator for the 50*l.* being a sum * of money due upon a contract in which he received *quid pro quo*; for the forbearing of a suit was as beneficial in saving, as some other things would have been in gaining. [* 347.]

Again; where in an action upon the case the plaintiff declared, that whereas C. was indebted to J. S. 4 Webb's case, 4 Leon. 110. and J. S. to the defendant; the defendant, in consideration that the plaintiff would procure J. S. to make a letter of attorney to the defendant to sue C., promised to pay and give to the plaintiff 10*l.* It was objected, that here was not *any* consideration to induce the assumpsit; for, that the defendant, by this letter of attorney, got nothing but his labour and travail: but, the exception was not allowed of; because, in this case, not so much the profit which redounded to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, was to be respected.

So, if one board another's wife for a year, and, after that year is past, the husband come to the landlord and promise him that, in consideration he will board his wife for a year longer, he will then pay him for this 3 Bulst. 187. 1 Roll. Rep 381, 382. 1 Roll Abr. 12. Pl. 10. year

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[* 348.] year and * for that which was past before; this is a good consideration to raise a contract by way of assumpsit. And the reason is, that the landlord is at prejudice by this; for, probably he would not have sojourned the wife for the last year, if it had not been for the promise of payment of the first money.

Vide Cecil v. Salisbury, supra, where infant bound, upon ground of sale being delayed.

1 Mod. Ent. 88.
Plowd. 5. 302.
1 Roll Rep.

413. Jeremy v. Goochman,
Cro. Eliz. 442.
1 Roll Abr. 11.
Q. Pl. 1. 2 Bulst.
73. 2 Leon. 225.

If a consideration is *executed*, and does not go along with the contract, but is entirely past, and the contract is merely subsequent; it is not a sufficient consideration to ground a contract upon, unless something arise between the parties that is meritorious. As if one, in consideration that I have built him a house, quitted him of a trespass, disbursed money on his account, or such like, promise me to do any other thing, or pay me so much money; these have been held not to be considerations: because there appears nothing but the consideration *perfectly past*, without *any* thing incident thereto to continue it. This therefore is but *nudum pactum*.

Dyer 272.

[* 349.] So, where a master promised to two men, that in consideration they *had* bailed his servant out of prison, he would save them * harmless; it was held that this did not bind him: because he had no benefit, nor they prejudice by his promise.

2 Bulst. 73.

But we must take care to distinguish *this* kind of case from those, where, although some part of the consideration appears to be past, yet it is all but one transaction. As where one, being possessed of a shop, agreed to demise it to another, paying to him 40s. by the year, and 10s. for the last quarter; and for the perfecting thereof each gave the other 1s. And afterwards, in consideration of the premises, the lessee promised to give the lessor 30l. and assumed to pay it; in consideration whereof, and in performance of the contract, the lessor made a lease to the lessee accordingly. It was objected, that there was no good consideration expressed to raise the promise for the 30l. the same being grounded upon a consideration that was past, perfect, and executed, and so no good consideration. *Sed per curiam*. The lease here is made *after* the promise. The agreement is in performance of *all*, not of part. It was on the lessor's part to make the lease to the defendant, and on his part to pay the rent of 40s. and the 30l. in consideration of his quiet

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* quiet enjoyment of the same, which is a *good promise*, [* 350.]
founded upon a good and sufficient consideration.

So, where the plaintiff was possessed of certain lands for a term of years, and, in consideration that he had occupied the lands and paid the rent, the defendant promised to save the plaintiff harmless: the plaintiff was disturbed, by his cattle being distrained. Now, though the occupation and rent was said to be past, yet, as the plaintiff continued in possession, and was still to pay rent, that preserved the consideration, and it was held good. Pearle v. Un-
ger, Cro. Eliz.
94.

So a contract made subsequent by one, in consideration of another marrying his daughter or cousin, which is as a gift in frank marriage, is good. Cro. Car. 407.
3 Salk. 96.

Again; a contract on a consideration executed is good, if there were a duty before: and, therefore, where the plaintiff declared, that such a day the defendant was indebted to him in so much, and, in consideration thereof, afterwards, to wit, such a day, the defendant promised to pay; this is not a * consideration past, but the continuance of the debt raises a promise and an action. [* 351.] Hodge v. Vava-
for, 1 Roll Rep.
413. Johnson v.
Atell, 1 Leo.
198.

This seems to be the principle that governed in the case of *Church and Church*; there, in assumpsit, the plaintiff declared, that, whereas he had at his own charges buried the defendant's child, the defendant promised to pay him his charges. And judgment was given for the plaintiff, and yet the consideration was past. But by the 43d of *Elizabeth* the father was bound to bury his child. Church v.
Church,
T. Raym. 260.

So, where the plaintiff declared, that, in consideration that he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance; here the consideration was adjudged not to be absolutely past; for the assurance was the substance of the sale. Warren v.
Morse, Cro.
Eliz. 138.

And if the thing be founded on a prior moral obligation: as a promise or contract to pay a just debt, though bound by the statute of Limitations; this will not be *nudum pactum*. 2 Blackst.
Comm. 445.

And a consideration past will be a good ground to maintain 1 Roll Abr. 11.
Cro. Eliz. 252.

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[* 352.] maintain an action upon a * *subsequent* promise or contract, where the consideration is stated to have been at the defendant's special suit and *request*; for the promise, though it follows, yet is not naked, but couples itself with the suit or request before, and the merits of the party procured by that suit or request. As for instance, though a promise to pay 10*l.* for that W. R. was bail for my servant is not good; yet a promise to pay 10*l.* for that he was bail for him at MY request is good.

Bosden v. Thinn, Cro. Ja. 18. Thus where A. requested B. to give his credit for two ton of wine, amounting to 50*l.* for one C. to D. and B. thereupon gave his bond of 100*l.* for the payment of that 50*l.* and for the non-payment thereof was sued, and enforced to pay 70*l.*; and, shewing this to A. he, (A) in consideration thereof, assumed to pay the 70*l.* unto B. such a day. It was objected, on assumpsit brought on this promise, that it was not sufficient. But the court held that, because C. upon B.'s undertaking at A.'s *request*, had credit given him by D. and that B. was damnified by reason thereof, which in conscience A. ought to satisfy, the consideration was sufficient and not passed.

[* 353.] * A mere stranger to a meritorious act done to a third person cannot thereupon found an assumpsit applicable to himself: therefore, where one in an assumpsit declared that, in consideration one A. would permit the defendants to sue another in his (A.'s) name, they promised to pay the plaintiff a sum due from A. to him, that was held no good consideration to support the action; for the plaintiff did nothing of trouble to himself or benefit to the defendant, but was a mere stranger to the consideration.

But, where a promise was made to the father, that, in consideration he would perform such a cure, the father should be paid so much and the daughter so much; there the nearness of the relation carried the benefit of the consideration to the daughter, and it was held that she might maintain an assumpsit.

Where forbearance of suit is the consideration of an assumpsit or agreement, two things must be observed: first, the forbearance must be general, or for a particular time certain, and not uncertain. And, therefore, where the declaration was, that, in consideration the plaintiff

Linghill v. Broughton,
Moore Ca.
1167.

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plaintiff would abstain from prosecuting the * defendant for a debt, the defendant would pay it before such a feast; there, inasmuch as it was to forbear, and neither mentioned whether it was a total forbearance, or for a time certain, it was held ill. [** 354.*]

But where the consideration was for a forbearance for a reasonable time, it was held good; and that the court ought to judge whether it was a reasonable time or not so. And, where the declaration set forth, that the defendant was indebted to the plaintiff; and that, in consideration thereof, and that the plaintiff would not implead the defendant, the defendant promised to deliver the plaintiff fourteen quarters of barley: this was held good. *Lutwich v. Hufley, Cro. Eliz. 19. Philips v. Sackford, Ibid. 455.*

Secondly, it must be from a suit or matter in which the defendant, or the person from whom the debt or thing is said to be due, is chargeable. ✕

Thus, upon an action on the case for a promise, setting forth that the defendant's son died indebted to the plaintiff; and that the defendant, being his mother (but not stating that she was executrix or administratrix to him, or that she had any effects of her son's in her * hands) promised, that, if the plaintiff would forbear to sue for his debt, she would pay it: this was adjudged to be no consideration; because she was not liable to any suit, so that the plaintiff had no prejudice by such forbearance. *Hammers v. Hulton, Hard. 73.*

But where a surety, having paid the debt of his principal who was dead, told his executor that he had paid the money, who thereupon promised to repay him, if he would forbear till such a day: it was adjudged a good consideration; for the executor was bound in equity, though not at law, without a promise. [** 355.*]

And idle and insignificant considerations, are looked upon as none at all; for, whenever a person promises without a benefit arising to the promiser or loss to the promisee, it is considered as a void promise. 13

Thus, if a man be arrested upon a void arrest, and another, in consideration of setting him at liberty, promises to pay the debt; if the arrest be unlawful the consideration is not good. *Randall v. Harvey, Godb. 358.*

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[* 356.]
Goodwin v.
Willoughby,
Hard. 73.

And where a lessee promised that, in * consideration the lessor would forbear to distrain his corn unshocked, he would pay his rent that was due: this was adjudged to be no consideration, because such corn was not distrainable.

Lee v. Newcomb, Hard. 73.
Et vide 9 H. 5.
14. Bro. tit.
Debt 36.

So where the defendant promised that, if the plaintiff would accept the defendant for his paymaster, for a debt due to the plaintiff by a stranger, and would forbear the defendant six months, he would pay the debt: it was adjudged no consideration, because the plaintiff might sue the stranger notwithstanding, and therefore was at no prejudice.

Latch 142.
Dyer 272. 31.
in note.

But, it is sufficient if there be a colour whereon to found a suit. In such case forbearance is a good consideration. As in *Whitpool's* case, where an infant bought velvet and silk and died, and the mercer came to his wife, being his executrix, and said, that if she would not pay him he would sue her, and the wife promised in consideration of forbearance to pay him: this was held to be a good consideration, upon the ground of the colour for a suit, *she being executrix*.

[* 357.]

Where the day given is the consideration, * it need not be set forth how the debt accrued.

Woolaston v.
Webb, Hob. 18.

Thus, where A. brought an assumpsit against B. and declared that, whereas B. did owe him 30*l.* in consideration that A. the 28th day of *August* 1610, had given day to B. for payment of the same money until the 9th of *October* following, B. did assume to pay it him the same 9th day; upon an issue non-assumpsit, it was found for A. and it was assigned for error, that it was not shewn for what the defendant was indebted: but the judgment was affirmed; for, the debt was not in question, as if it had been an ordinary *indebitatus assumpsit*, where the debt itself is the only consideration of the promise, for there it must appear to the court; but, *here*, it was the day given, that was the express consideration. And though it were true that there must also be a debt, yet this was allowed in the promise, *being actual*, and also found by implication in the verdict.

Thorpe v.
Thorpe, 1 Vent.
177. 214.
3 Salk. 95.

In executory contracts, if the agreement be that the one shall do an act, and, for the doing thereof, the other shall pay, &c. so that the considerations are mutual; the

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the doing of the act * is a condition precedent to the payment, and the party who is to pay will not be compelled to part with his money, till the thing be performed for which he is to pay. [* 358.]

But this rule admits of these diversities.

Ibid.

First, If a day be appointed for the payment of the money, and the day is to happen *before the thing can be performed*, an action may be brought for the money before the thing be done; for, it appears the party relied upon his remedy, and did not intend to make the performance a condition precedent.

48 E. 3. 2. 3.

7 Co. 100. b.

1 Vent. 147.

1 Saund. 319.

Secondly, Where a certain day of payment is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract; in such case performance is a condition precedent and must be averred in an action for the money: for every man's bargain ought to be performed as he intended it; and when he relies upon his remedy, it is but just, that he should be left to it according to his agreement: but, on the contrary, there is no reason that a man should be forced to trust where he never meant it. And, therefore, if two men should * agree one that the other should have his horse, the other that he would pay ten pounds for him; no action would lie for the money until the horse were delivered.

Ibid. Jones 218.

Vide contra.

Dyer 76. Pl 30.

1 Roll 414. 415.

Dyer 30. Pl.

203.

[* 359.]

But, Thirdly, If another in consideration, that I promise to do such a thing, promise to do another thing for me, or pay me money at such a day; *here* I need not alledge that I had performed what I had promised, but I may have an action against him for his not performing his promise to me; because the consideration and foundation of his promise to me was the promise I made to him; it is promise for promise; and that is the consideration and not the performance, and each party has a right of action against the other for non-performance. And it is a general rule, that, when the defendant has a *remedy* for the *consideration* of a promise, that consideration need not be averred to be performed: as if, in consideration that A. promises to deliver me to my use a cow, B. promises to deliver A. 50s. Here B. may bring his action without averring the delivery of the cow. So if I covenant to marry a man's daughter, and he covenants to give me a hundred pounds, either party may

1 Vent. 177.

214. Hob. 88.

1 Lev. 293.

3 Bulst. 187.

H. 7. 10.

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[* 360.] may sue the other without averment of * performance on his part. Again, If it be mutually agreed between A. and B. that A. shall, before *Lady-Day* following, convey over all her estate and interest in the real estate of B. deceased, to C. and her heirs; and, in consideration thereof, C. shall, before that time, pay to A. 25*l.* and convey unto her and her heirs so much of the said real estate as shall amount to 50*l. per annum*, and enter into a bond of 2000*l.* And B. at the same time, in consideration that A. promises to perform her (A's) part of the agreement, promises to perform her (B's) part of the same. Here neither party, on bringing an assumpsit, need aver performance on her part. For the performance is not *sub modo* or conditional, but absolute and reciprocal by reason of the agreement; for, it is not in consideration that A. should convey all her estate, &c. but in consideration that she agrees to do it. And the consideration upon which the action arises, is the mutual promise to perform the agreement.

Salk. 21. Hob.
88.

Mutual promises must be both binding, as well on the one side as the other; and must be both made at the same time, or else they will be both *nuda pacta*.

[* 361.] * A contract or agreement may be supported either by a valuable consideration: as marriage, work done, &c. or by a good consideration: as, that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one near relation to another.

Beard v. Nuttall, 1 Vern.
427.

The case of *Beard* and *Nuttall* furnishes an instance of the latter description. There B. (whose husband after marriage entered into a voluntary bond to settle a jointure of a certain value on her, and afterwards settled land of the stipulated worth, whereupon the bond was delivered up to be cancelled) her husband being dead and she evicted, filed a bill praying that she, there being no creditors, might, as administratrix of her husband, retain out of his personal estate against the defendants, who claimed a share of the personal estate under the statute of Distributions, to the value of her jointure. And the court decreed that, in regard the wife was now become entitled to dower, she should proceed at law for the recovery thereof; and that what the same should fall short in value of the jointure, should be retained by her out of the personal estate, notwithstanding

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* notwithstanding her bond was after marriage, and voluntary, and delivered up to be cancelled: for the delivery up of the bond could no way bind her interest. [* 362.]

Various other considerations may be made the foundation of a contract or agreement, according to the respective objects those who contract have in view: therefore if an agreement be made to save the honor and reputation of a family, a court of equity, willing to lay hold of any just ground to uphold it, will consider the establishment of the peace of a family as a good consideration.

Thus in the case of *Stapilton* against *Stapilton*, the point in which, material to our present purpose, arose on an agreement entered into by a father and his sons (he having two, the eldest of whom was by the same mother, but illegitimate, being born out of wedlock; but that fact at the time of the agreement unknown to the sons or to any other person, the father and mother having long lived together as husband and wife, and being actually so when it was entered into) the consideration whereof was stated to have been for settling * and perpetuating all the manors, &c. in the name and blood of the *Stapiltons*; for making provision for his two sons, &c. and for preventing disputes and controversies that might possibly arise between them, or any other persons claiming an interest in all or any of the estates therein-mentioned; for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s. It was held by Lord *Hardwicke*, in a dispute between the eldest and the youngest son, that the circumstances recited in the agreement were a proper consideration for it, and he decreed a specific execution of it against the legitimate son. [* 363.]

So where a covenant for settling lands, entered into by the uncle in favor of his nephew, who had disobligened his father by marriage, was recited to have been made with an intent to reconcile the nephew and his father, and for natural affection: this was held to be a good consideration for the agreement.

And, in the case of *Cann versus Cann*, Lord *Macclesfield*, Cann v. Cann. cited 1 Atk. 10.

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[* 364.] *field*, we have seen, was of * opinion, that the com-
promise of a doubtful right was a sufficient considera-
tion for, and foundation of an agreement.

Et supra, et
vide, Gilmore
v. Battison, 1
Vern. 4. S. C.
2 Vent. 353.
Et vide, 2 Vez.
284.

And the common law, in some cases, considers the
entrusting a thing with another, and his undertaking
respecting it, as a consideration in itself for his faithful
discharge of the trust; and, therefore, though an ac-
tion will not lie for not doing a thing, where there is
no consideration to uphold a contract to do it; yet,
where there is a delivery of goods and chattels to a per-
son, who undertakes to carry them, or do something
about them *gratis*, without any reward for such his
work and carriage, an action will lie on this bailment,
if there be a neglect in the management by which the
goods are spoiled. The obligation in this case arises

Bracton, lib. 3.
100.
Vid. Supra, 254.
Lib. 3. tit. 27.
684.

ex mandato, and is called in *Bracton*, *Mandatum Vin-*
nius, in his commentary on *Justinian*, defines *manda-*
tum to be *contractus quo aliquid gratuito gerendum com-*
mittitur et accipitur. This undertaking, we have seen,

obliges the undertaker to a diligent management.
Bracton says, *contrahitur etiam obligatio non solum scriptis*
e. verbis, sed et consensu, sicut in contractibus bonæ fidei;

[* 365.] *ut in * emptionibus, venditionibus, locationibus, conduc-*
tionibus, societatibus, et mandatis.

Vide 19 H. 6. 49.
Bro. tit. ac sur
le Ca. 24. 48 E.
3. 6.

This distinction is clearly taken in 11 H. 4. 33.
where an action was brought against a carpenter for
that he had undertaken to build the plaintiff a house
within such a time, and had not done it; and it was
adjudged the action would not lie, there being no con-
sideration. But there the question is put to the court;
what if he had built the house unskilfully? and it was
agreed, that in such case the action would have lain.

Wheatly v.
Lowe, Cro.
Ja. 667.

So on an action on the case declaring that, whereas
L. (being obliged to J. S. in 40*l.* for the payment of
20*l.* and the bond being forfeited) delivered 10*l.* to M.
to the intent that he should pay it to J. S. in part of
payment without delay; in consideration whereof M.
assumed, &c. It was assigned for breach that M. had
not paid the money, whereupon J. S. had sued L. for
the debt, and on non-assumpsit pleaded, there was a
verdict for the plaintiff. And it was moved in arrest
of judgment, that here was not any consideration;
because

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because it was not * alledged that he delivered it to M. [* 366.]
at his request; and the acceptance of it to deliver to
another without delay, could not be any benefit to M.
to charge him with this promise. *Sed non allocatur*; for
being that he accepted this money to deliver it, it was a
good consideration to charge him. And judgment for
the plaintiff, which was affirmed on writ of error.

This point was finally settled by *Holt* and all the Coggs v. Bar-
Judges in the celebrated case of *Coggs* and *Barnard*; nard, L. Raym.
which arose upon an action upon the case, wherein the 909. S. C.
plaintiff declared, that, whereas the defendant assumed Comyns 133.
safely and securely to take up several hogshheads of Salk. 26. 3 Salk.
brandy then in a certain cellar in D. and safely and
securely to lay them down again in a certain other cel-
lar in W. the said defendant, and his servants and
agents so negligently and improvidently put them down
again into the said other cellar, that, for want of care
in the defendant, his servants and agents, one of the
casks was staved, and a great quantity of brandy was
spilt; a motion was made in arrest of judgment, be-
cause it was not alledged, in the declaration, that the
defendant was a common porter, nor averred that he
had any thing for his pains. And as to the objection,
that there * was no consideration to ground the promise
upon, and that the undertaking was *nudum pactum*, [* 367.]

Holt, Chief Justice, and the rest of the court answered,
that the owner's trusting the bailee with the goods,
was a sufficient consideration to oblige him to a careful
management. Indeed if the agreement had been exe-
cutory, to carry these brandies from one place to ano-
ther such a day, the defendant had not been bound to
carry them; but this was a different case; for assump-
sit did not only signify a future agreement, but in such
a case as this, it signified an actual entry upon the
thing, and taking the trust upon himself. And if a man
will do that, and miscarries in the performance of his
trust by reason of gross neglect, an action will lie against
him for that, though nobody could have compelled him
to do the thing.

It is held upon the same principles, that, if I pro-
mise another to keep him certain goods safely to such a
time, and, after I refuse to take them, there lies no ac-
tion against me for it. But if I take them, and they be
afterwards lost or impaired *through my negligent keeping*,
there an action lies.

It

Dr. and Stud.
Dial 2. cap. 24.
fol. 212.
29 Aff. 28.
Owen 141.

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[* 368.]

1 Vez. 450.

Supra.

*-It is not necessary that, in contracts or agreements, the consideration should be expressed; it being sufficient if it can be collected out of them from circumstances; and, therefore, although, in Lord *Baltimore's* case, which arose on an agreement concerning the boundaries of two provinces in *America*, nothing valuable was given on the face of the articles as consideration; yet, Lord *Hardwicke* held, that the settling boundaries, and peace and quiet, was a mutual consideration on both sides; and would, in all cases, make a consideration to support a suit in the court of Chancery for performance of an agreement for the settling them.

Vide 1 Leon.

170. Moore

504, 570.

Cro. Ja. 819.

Pl. 14. Dyer

91. b. in note.

And it is said that, if a man bargain and sell his land by deed indented and inrolled without expressing any consideration, the bargainee in pleading will not be obliged to aver payment of money, because it is necessarily implied; and a distinction is there taken between cases where any other consideration than money, and where no consideration whatever is expressed. *Sed quare.*

[* 369.]

Vide Bedell's

case, 7 Rep. 40.

But, if an express consideration appear upon * the face of a contract or agreement, the better opinion seems to be, that, if it be insufficient to support the contract, no other can be implied.

Edwards v.

Lady Warwick,

2 P. Will. 176.

And Lord *Macclesfield*, in the case of *Edwards* and *Lady Warwick*, said, that he took it to be clear, that if one voluntarily, and without consideration, covenanted to lay out the money in a purchase of land to be settled on him and his heirs: a court of equity would compel the execution of such a contract, though merely voluntary: because in all cases, where it is a measuring cast between an executor and an heir at law, the latter, in equity, will have the preference.

Quare, If the intent in favor of the heir be not a sufficient consideration to support the covenant?

Of the Interpretation of Contracts or Agreements, &c.

CONSTRUCTION is the drawing an inference, by the aid of reason, as to the intent of an instrument from given circumstances upon principles, deduced from men's general motives, conduct, and actions.

It has been already observed, that in all contracts and agreements, the parties stipulating must respectively assent to that which is concluded upon between them, and that such consent must be made evident to third persons by certain signs, expressing the intentions of the parties, and heads of the contract. And since these signs may sometimes be taken in different senses, it is necessary there should be some rule to find out that which is true and genuine. If, then, we reflect upon the object for which contracts and agreements are entered into, we shall find, that it is to raise an obligation concerning that which is *intended* to be accomplished, * when the parties engage in such contract or agreement; for that a contract or agreement, in whatever terms it may be expressed, cannot be carried beyond the intent of the parties at the time of entering into it, is clear from the nature of its constitution; one essential ingredient being, "that it is entered into freely, of the parties own accord." [* 371.]

Therefore, if a man grant by his deed, that if J. S. be not yearly paid the sum of 10s. then he may distrain for it in his manor of *Dale*; this is, by inference of law, a good rent-charge *out of* the manor: because he has given the grantee a power to distrain, if such a yearly sum be not paid him, and the manor being thereby charged with the distress, is, consequently, charged with the rent for which the distress is given. But no writ of annuity lies for it, because there is no grant of the rent by the grantor. J. Co. Litt. 146, 147.

So, if a rent be granted to A. with a clause in the grant that if the rent be behind, a stranger shall distrain for it for the use of the grantee; this, in construction of law, is a good rent-charge in A. and a distress, limited to a stranger for his benefit, is, in effect,

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[* 372.] effect, making the stranger the grantee's servant for this purpose; and what a man may do by one servant, he may do by himself or any other.

Salk. 154. Pl. 2.
Vide 1 Vern.
341. Pre. Chan.
252.

The court of Chancery proceeds upon the same principle, when it holds, that if a term be raised for a particular purpose, in pursuance of marriage articles, it shall, when that purpose is answered, fall again into the inheritance, and shall not be assets to pay any debts, but what affect the inheritance: as bond debts and debts of a superior nature, and not simple contract debts.

But a contract shall be carried in equity to the full extent intended, if, by any construction, the words can be made to effect it.

Thus, if there be a trust to raise money out of the profits of an estate, it implies, in equity, a sale, if the sum cannot be raised conveniently within the time limited; for the intent is, that the money shall be raised.

[* 373.] The intent of the parties to a contract or agreement, is to be gathered from external signs and actions; for whatever difference * there may be between a man's internal sentiments and external expression, he must, in his ordinary transactions with mankind, be concluded to use signs according to their common acceptance: for there could be no such thing as an obligation, if a man might affix what interpretation he pleased to his signs, and that he meant to use them different from their received signification. Therefore he, in whose favor an obligation is incurred, has a right to compel him, from whom it is due, to perform it in that sense, which the ordinary interpretation of the signs made use of import.

The signs of the intentions of men are of two sorts; namely, Words and Actions.

Plowd. 169.

As to positive words. The rule seems to be, that, unless there be the most decisive reasons which lead us to conjecture the intent was otherwise, they are to be understood in their proper and most known signification. Not the grammatical one, which regards the etymology and original of them, but that which is vulgar and most in use; for use is the judge, the law, and the rule of speech.

Thus

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* Thus if a man agree with B. for twenty barrels of ale, he shall not have the barrels after the ale is spent. [* 374.]
 So if one covenant with another, that if that other come to his house he will give him a cup of wine, the covenantee shall have the wine, but not the cup. But if the bargain were for firkins of wine, or for a hoghead of wine, then the vendee shall have the firkins or the hoghead. Plowd. 86. Bro. Contract. 4. 27 H. 8. 27 b.

So words used in the present tense shall be taken for the future, where according to their ordinary import they are so meant: as if a man lease a house for years, upon condition that if his wife, *being a widow*, will inhabit it, the term shall cease; this shall be taken after his death for a future time. 27 H. 8. 19.

So the words *dedi et concessi*, in a deed of feoffment, shall be taken for the present time, and yet they are in the præterit tense. 35 H. 6. 11 b. 15. 17 a.

A lawful age in general words (unless it be in a particular case, as of a guardian in soccage) shall be construed and taken to mean twenty-one years. 1 Chan. Rep. 53. 54.

And where a lease was made for *octoginta et terdecem annos*, the question being, whether *terdecem annos* should signify thirty, or thirteen years; it was contended, that it should be expounded for thirty-years, because it should be taken most strong against the lessor: but the court held unanimously, that it should be taken according to the common *parlance*, for thirteen years; for *terdecem* and *tres-decem*, were all one, and so writ *euphoniæ gratia*; and it being one entire word, it could not be otherwise taken. [* 375.] Hopehill v. Searle, Cro. Car. 386.

So a lease for twelve months, is only for forty-eight weeks; because a month, in law, is a lunar month, or twenty-eight days, unless otherwise expressed. But if a lease be for a twelvemonth, in the singular number, it is good for the whole year; it being generally understood, that by the space of time so called, in the singular number, *viz.* "*a twelvemonth*," the whole year is meant. 2 Black. Com. 141. 6 Rep. 61.

Again; if a man grant one hundred acres in such a field, and sixty in such a field, and twenty acres of meadow in such a meadow, in which fields or meadows the acres are known by estimation; the acres shall be taken as they are *so known*, be they more or less than Poph. 55.

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[* 376.] * than statute; for they pass as they are known, and not according to the measure of the statute. But if I have a *close*, containing by estimation *in the aggregate* twenty acres, and which, by the statute, is not eighteen acres, and I grant ten of these acres, the grantee shall have them according to the measure of the statute; because the *acres* of such a close are not known by the estimation by *parcels*, or by *metes* and *bounds*, though the close be estimated in the aggregate.

And where words used in a contract, expressive of quantity, or the like, have different significations in different places; they will take effect as they are understood where they are spoken.

Sheph. Epit.
172.

Thus, if one sell todys, or pounds, bushels, yards, ells, or perches of any thing, they will be accounted, measured, and reckoned according to the custom of the country or place where they are, and not according to statute measure, or the custom of any other country.

But, when words are equivocal, or sentences are ambiguous, and capable of several significations, conjectures are necessarily * resorted to, in order to discover the true meaning of the parties. And such conjectures may be made from three sources: the subject, the effects, and the circumstances.

[* 377.]

First; it is a rule, that words are to be understood according to the subject of them, which is thus expressed by the civilians: *Verba generalia restringuntur, ad habilitatem personæ, vel ad aptitudinem rei.*

14 Aff. Pl. 21.

Therefore, if a man grant to another common within the metes and bounds of the village of *Dale*, and part of the vill is his in severalty, and part his waste and common; the grantee shall not have common in that which is his in severalty.

9 H. 6. 35.
Fitzh. Com-
mon. 6. 12 H. 8.
2.

So, if I grant a man common out of all my manor, he may not, by virtue thereof, have common for any beasts but such as are commonable, nor take it in my garden, or any such place, but only in commonable places. And if I grant one common for ten beasts yearly for three years, and he do not take his common the first two years, he shall not put on thirty beasts, and take all the third year. Upon the same principle, if a
man

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man * grant another common for all manner of beasts [* 378.] without number, the grantee may not take this, with so many beasts, as to leave the grantor no pasture for his cattle.

So, if I grant a man all my trees growing upon my lands in D. it shall not extend to apple-trees, or other fruit trees growing in my gardens and orchards, if there be any other trees upon my ground. ^{14 H. 8. 2.}

Again, where there was a proviso in a lease of a manor, wherein were divers copyholds, " that the lessee should not molest, vex, or put out any copyholder paying his duties and services *sub pœna forisfactura*, and the lessee entered upon a copyholder in a cow-house, parcel of the premises, and beat him; this was held not to be any breach of the condition: for it is to be intended of such a molestation as should be an expulsion or molestation concerning his copyhold tenement, and there is not any breach by a tort done to his person, or in disturbing him in any other lands, unless they were his copyhold tenements within the manor. ^{Penn v. Glover, Cro. Eliz. 421.}

So, if a man covenants to let land for * years, [* 379.] which is but a covenant, he will not thereby be bound to defend against tortious injuries. ^{26 H. 8. 3. 26. H. 6. fol. 3. b.}

Again, where, on an *assumpsit* that A. should enjoy such lands, according to his lease, without the let, interruption, or incumbrance of any person; it was shewn in fact, that this land was extended for debt due to the king by process out of the Exchequer, and so incumbered: after verdict, it was moved, in arrest of judgment, that this was not a good breach assigned; for it was not shewn for whose debt, nor where, nor by whom it was due, and it might be that it was for the plaintiff's own debt. And it was adjudged for the defendant, for to establish a breach of the covenant, the plaintiff must shew a lawful incumbrance. ^{Brocking v. Cham. Cro. Ja. 425, 10. et vide Foster et al. v. Mapes. Cro. Eliz. 212, 213.}

So, where a man was bound by covenant in law, that his lessee should enjoy his term, and the lessor gave bond for the performance of covenants; and on an action of debt brought upon the bond, the breach assigned was, that a stranger had recovered the land leased in an *ejectione firmæ*, and had execution: it was held that, although this eviction was by course of ^{Nokes's case, 4 Rep. 80. et vide Hamond v. Dod, Cro. Car. 5. et Cowperv. Pollard, W. Jones 197. 8 Rep. 91. b.}

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[* 380.] * of law, yet, as an elder and sufficient title was not al-
 ledged upon which the recovery was had, it was no
 breach of covenant.

And, " to give effect to the intent," the construc-
 tion of a contract, as to the manner of its operation, will
 vary according to accidental circumstances, affecting
 the state of the subject contracted about after the con-
 tract entered into, and before its completion.

Co.Litt. 147. b. Thus, if A. bargain and sell land to B. by inden-
 ture, and, before enrolment, they both join in a grant
 of a rent-charge to C. this, after the enrolment, will be
 construed the grant of B. and the confirmation of A.
 Because, when the bargain and sale is enrolled, it has
 the effect of a deed enrolled from the making thereof,
 and thereof it must be the grant of B. who had the
 land at the time of the grant made. But, if the deed
 never be enrolled, then it shall be construed the grant
 of A. and confirmation of B. because the land never
 passed from A. the deed being ineffectual and void with-
 out enrolment.

[* 381.] So, *ut res magis valeat quam pereat*, the * construc-
 tion of the same kind of contract, as to the manner of
 its operation, will vary in different cases, according to
 the manner in which it is carried into effect: *Ex gratia*.
 If tenant for life, and he in the remainder or rever-
 sion in fee, join in a feoffment by deed, it is held, on
 construction, that the livery of the freehold moved from
 the tenant for life, and the inheritance from him in
 the reversion or remainder, from each according to his
 estate. But if a feoffment be made by parol, then it
 is the surrender of the tenant for life, and the feoffment
 of him in remainder; for, otherwise, nothing would
 pass by parol.

And where the same words, in the same contract or
 agreement, are applicable to subjects of different na-
 tures, a different construction may be put upon them
 according to the nature of each subject, and to answer
 the intent.

As if a limitation of freehold and leasehold, or
 copyhold and leasehold, were comprised jointly in
 the same form of words. In such case there could
 be no reason why a court should not construe the
 limitation, although contained in articles or an agree-
 ment, differently according to its application to the one
 subject

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subject or the other, as was done in the cases of *Forth* [* 382.]
and *Chapman*, and *Glenorchy* and *Bosville*, in the con-¹ P. Will. 663.
struction of devises. And of this opinion was Lord³ Ca. T. Talbot
Hardwicke in the case of *Exel* and *Wallace*.

Secondly, the effect and the consequence that will² Vez. 325.
follow, from accepting words in their ordinary import,
frequently leads us to a necessary conclusion, that the
genuine meaning of the person using them, is different
from their common acceptation; as where words, if
taken according to their ordinary sense, will render a
contract ineffective and frivolous. In such case we
may a little deviate from their received sense to prevent
this inconvenience; for *verba aliquid operari debent, et*
eam effectum sunt accipienda.

Thus if a lease be to A. for life, rendering rent at³ Leon. 211.
Michaelmas, and after his death to his executor *until*
Michaelmas; the executor, notwithstanding the word
until, is, in its general sense, exclusive, shall have it
for the whole day of *Michaelmas*; because otherwise
no rent would be due.

So if an annuity be granted *pro consilio * impendendo*; [* 383.]
or a feoffment for instructing a son, or for paying of a⁴ Noy's Maxims,
sum of money; these amount to a condition, without¹⁴
conditional words; because otherwise the party would
be without remedy.

So if A. sell to B. ~~the four~~^b parts of his manor of⁴⁷ Bacon's Max.
Dale, and say not in how many parts to be divided,
this shall be construed four parts in five; but it shall⁴⁷ Quere, Should
not be intended four parts of four parts, or the whole⁴⁷ not this be
of our quarters; because that would render the words
idle and of none effect.

Upon the same principle, viz. that the object intended⁴⁷ Vide infra.
by the parties would fail of effect, subject to any other con-
struction, the court of Chancery interposes to carry
marriage articles into execution by way of strict set-
tlement, notwithstanding the articles themselves are
not penned in that manner: for the great and imme-
diate object of such agreements, and consequently the
principal intention of the parties is, to make such a
settlement as will contain an effectual provision for the
issue, which end will not be answered by a settlement
that pursues the language of the agreement; because the
Vol. I. O effect

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[* 384.] effect and consequence of * such a settlement, would be to leave the issue at the mercy of the ancestor, who would have power to bar them by fine or recovery.

Stokes v.

Stokes, 1 Lev.

272.

And where, in debt on an obligation, the defendant pleaded a release; and therein it was recited, "that whereas J. S. had arrested the defendant in the name of the plaintiff without his knowledge, he thereby released to the defendant all demands *on his own account*." And it appeared that the obligation was taken by J. S. in the name of the plaintiff, in trust for the children of J. S. and thereupon J. S. caused the defendant to be arrested in the name of the plaintiff, upon which the release was given; it was adjudged that the obligation was not released thereby, because although it was taken in the name of the plaintiff, it was not on account of the plaintiff, but on account of the children of J. S. And the words "upon his own account" were put in to some purpose, and they could be for no purpose, but to distinguish the demands that he had in his own right, from what he had in the right of, or in trust for others.

[* 385.], Thirdly, The actions or circumstances attending a transaction, may be called in aid to * explain the nature of dealings between parties, where, otherwise, an ambiguity hangs over them.

Thus if two men should bargain for wheat, without mentioning the quantity or sort, it would be an imperfect bargain. But if by their former dealings it appeared, that such a sort and such a quantity was thought of and designed, it would be as good as if it had been actually expressed.

41 E. 3. 6. 19.

So if a man grant A. B. an annuity of 10*l.* a year *pro consilio impenso et impendendo*; if A. B. be a physician, it shall be understood of his counsel in physic; and if he be a lawyer, of his counsel in law.

Bacon's Max.

71.

Again, If I let a tenement to J. S. near by my dwelling-house in a borough, provided that he shall not erect or use any shop in the same without my licence; and afterwards I licence him to erect a shop, and J. S. is then a miller; he shall not by virtue of these words erect a joiner's shop.

Cook v. Booth,
Cowper 819.

Upon this principle the court of King's Bench decided the case of *Cook and Booth*.

That

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* That case arose upon a covenant in a lease for three lives, "that if the lessee, his heirs and assigns, should be minded, at the decease of the said A. B. and C. or any of them, to surrender that lease and take a new lease of the said premises, and thereby add one new life to the then two in being in lieu of the life so dying, that then the lessor, his heirs, &c. upon request, on such surrender of the lease then in being and upon payment, &c. to the lessor and his heirs, &c. for every life so to be added in lieu of the life of every of them so dying, and at the proper costs of the lessee, without demanding any further fine for the same, should and would grant and execute unto the lessee, his heirs, &c. a new lease for the *lives* of the two persons named in the former lease as should be then living, and of such other person as the lessee, his heirs, or assigns, should nominate and appoint, in lieu of the person named in the preceding lease, as the same should respectively happen to die, under the before-mentioned annual rent, and the *same* covenants therein contained." There had been successive renewals of this lease, containing the same clause of renewal. At length the lessee died. And afterwards a new lease was * tendered to the heir of the lessor, who refused to execute it, because it contained a covenant for renewal on the death of D. and E. who were not any of the lives named in the original lease. And one question was, whether the heir of the lessor was bound to add any covenant for renewal after the death of the surviving nominee, or, in other words, whether this were a covenant for a perpetual renewal. And Lord *Mansfield*, *Willes*, and *Ashburst*, were of opinion that, there having been four or five renewals, the lessors themselves had put the construction upon the covenant: for in all of them the covenant for renewal had been uniformly repeated.

In some cases the ordinary import of words may be *Vide inf.* restrained.

First, where there is an original defect in the will of the speaker, so that it is not co-extensive with his words.

And, secondly, where there is some collateral accident inconsistent with the speaker's design.

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[* 388.] Under the first of these distinctions, we may * comprise all cases where there is good reason to conclude, that the person who spoke was aware of certain things, and yet did not intend to include them in the general terms he used; though he did not expressly except them, because he supposed such an exception clear in itself.

3 Mod. 278.

Thus if a man have goods of his testator's, and also other goods in his own right, and grant "*omnia bona sua*;" the goods that he has as executor do not pass. For though they are *bona sua*, in respect of the possession that he has of them, yet they are not so strictly speaking. A man may, therefore, naturally conclude, that when he is using words applicable to things which he has in his own right, he must be taken as meaning to except out of them things which he has as executor, although his terms being general, might, in some sense, be applicable to them.

Dobson
v. Crew,
Cro. Eliz. 705.

So if the condition of a bond be, that A. shall not hurt, endanger, or molest B. in his lands or goods upon *any* account: it shall be intended of a tortious molestation; but not to restrain A. from pursuing the obligee for felony, or upon any other just cause.

[* 389.]
Co. Lit. sec.
535. 6. 7.

* Upon the same principle it is held, that the lord by confirming the *estate* of his tenant, does not pass his right to the feigniory, although the word "*estate*" be sufficiently operative to include it: because the confirmation or assent to the estate, in a reasonable construction of it according to the subject, cannot be interpreted to pass a distinct right in the lord separate from the estate in the tenant; since his words take effect and have a full operation, without concluding, from his assent to one estate, that he has parted with the other.

This *original defect* of the will may be discovered, either, from the circumstance that an *absurdity* would evidently follow such construction, or from a defect of matter contracted about.

The principle in the first instance is, that no man is to be supposed to intend that which is *absurd*.

Tisdale v. Es-
sex, Hob. 34.

Therefore if a man covenant that another shall have, occupy, and enjoy certain lands for seven years; an ejectment by a stranger will be no breach of this covenant;

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nant; and one * reason is, because the law will never [* 390.] judge that a man will be so absurd as to covenant against the wrongful acts of strangers, except he covenant expressly to that purpose.

So if the covenant be to save harmless *against all persons*, it will be understood against a lawful entry or eviction. Cro. Eliz. 213.

But if it were to save harmless against a person certain, the covenantor ought to defend the covenantee against the entry of that person, be it by right or wrong; for the covenantee is damnified if he be disturbed, though by wrong, and the covenant shall (where it does not involve an absurdity, as would be the case were a man to covenant against the unlawful acts of all the world) be taken most favorably for the covenantee. Ibid.

The principle in the second instance is, that the matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense: and, therefore, the generality of the words used, shall be restrained by the particular occasion.

Thus where A. had a judgment of 6000*l.* * against B.—B. gave A. a legacy of 5*l.* and died. A. on receipt of this 5*l.* gave the executor of B. a release in this manner: I acknowledge to have received of C. 5*l.* left me as a legacy by B. and do release to him *all demands* which I, against him *as executor of B.* can have, for any matter whatsoever: it was adjudged, that the generality of the words, *all demands*, should be restrained by the particular occasion mentioned in the former part thereof, *viz.* the receipt of the 5*l.* legacy, and should not be a discharge of the judgment. [* 391.] Knight v. Cole, cited 1 Eq. Ca. Abr. 170. Pl. 4. note a. 1 Lev. 101.

So if a man by indenture let a house for years, and the lessee covenant to repair it well from time to time during the term; and at the end of the term to leave the same well repaired to the lessor; and a breach be assigned, for that he did not leave it well repaired at the end of the term. And the lessee plead that the lessor, within three days after the date of the indenture, released all debts, duties, and demands; and the truth be that the lessor had recovered six pounds damages and costs against the lessee, and made an acquittance upon the receipt thereof, with a general release of all actions, duties, and demands. This release will not be Hancock v. Field, Cro. Jam. 170. 11. Et vide Henn v. Hanson, infra.

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[* 392.] be any bar, although it be * "of all demands," which is the most general word in releases.

Henn v. Han-
son, 1 Lev. 99.
S.C. 1 Sed. 141.
Et vide Cro.
Eliz. 606.

Vide 8 Rep.
153. b. Co.
Litt. 291. b.

So if there be a covenant in a lease for years to pay rent reserved; and, after the release made, the lessee, in performance of an award of all matters in controversy between the lessor and the lessee, give a release of all demands at a day before any rent is due; this will not release the rent: and yet the rent, although not then due, is a cause of demand; and by a release of all demands, not only all demands, but also all causes of demands are released. And the chief reason is, on the intent of the parties: because the release, being made upon an award, is intended only to release things then awarded, and not a growing rent. And a release, and the general words in it, shall be restrained and bound to the intent of the parties.

Hetley 15.

So where, on a writ of annuity, a release was pleaded by which the plaintiff acquitted the defendant of one payment for half a year, and released to him all actions, suits, and demands; it was adjudged that the release does not bar him out of the arrearages of half a year.

[* 393.] * Upon the same principle, if an estate be given to a man and his heirs male, his grandsons by his daughter are not supposed to be meant by it; for, from the nature of such a settlement, males are *plainly* meant to be *alone* included.

Dafforne v.
Goodman,
2 Vern. 362.
Et vide Salk.
154. Pl. 2.

So where one possessed of a term for years, on his marriage, assigned it to trustees in trust for himself for life, remainder as to a moiety to his wife for life, remainder as to one moiety to the heirs of the body of the wife by him begotten, remainder as to the other moiety to the children of the body of the wife. It was held that, this being the estate of the husband, and the settlement to the purposes before-mentioned being made upon his marriage, the declaration of trust for the benefit of the children of the wife, must be intended the children of *that* marriage, and not her children by any other husband.

Secondly, an original defect of the will may be discovered, where there is some collateral accident falls out inconsistent with the speaker's design: as in a case where something happens that could not be foreseen, but is such as, if it had come into the mind of him

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* him who spoke, he would have excepted it: as in [* 394.] the case put in *Cicero* of him who falsely believing his own son to be dead had made another his heir. Cicero de oratore, lib. 1. cap. 39.

Fortescue held, in a similar case put by him, namely, that if *cestui que use* had issue a daughter, and, being sick, declared his intent to his feoffee, that his daughter should have his land after his decease, and he had afterwards recovered his health and had issue a son; that it was good conscience that the son should have the subpœna, for he was his heir. The reason was, that the father's intent proceeded upon the supposition that he should have no son, which proving false, there was no intent in favor of the daughter. Fitzherb. tit. Subpœna 23. Statham conscience 1. Rep. 100.

And the principle would be equally applicable in case of a contract so circumstanced.

Thus where A. gave bond to pay 900*l.* to his daughter in case he should have no son living at the time of his decease, and he died his wife enseint with a son. On a question whether the daughter should have this 900*l.* which if she had, it would have been more than his son would have had. *Per curiam*, * She shall not have it: for although there was no son living at his decease, so that it was recoverable at law, yet it could not be presumed to be the father's intent, that, if a son were born after his decease, the daughter should run away with the estate. And upon this ground the son was relieved in equity. Gibson v. Gibson, 2 Freem. 223.

But if there be in the terms of a contract any obscurity or dubiousness, which cannot be cleared up by the intention of the contracting parties or any other circumstance, and all other rules of exposition of words fail, then the construction ought to be against him who ought to have explained himself, or made the other have delivered himself fully. And, therefore, he who is obliged ought to speak clearly, or otherwise, in general, the other party has a right to explain the clause for his own advantage. Therefore if two tenants in common grant a rent of ten shillings, this is several and the grantees shall have twenty shillings; but if they make a lease and reserve ten shillings, they shall have only ten shillings between them. So if a man, seised of twenty acres of land, grant a rent of twenty shillings *perciendum de qualibet acra terræ suæ* or out of every acre of land. This is in nature of a several grant 5 Co. 7. b. Plowd. 140. 161, 171, 289. Co. Litt. 197. a. 267. b. Co. Litt. 147. Roll Abr. 228. Kelw.

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[* 396.] * grant out of every acre ; for the strongest construction against the grantor is, that the grantee shall have twenty shillings out of each acre. In this rule of construction the law of *England* agrees with the *Roman* law, wherein it was a maxim that all obscurities and ambiguities in a bargain of sale, or letting, must be interpreted against the seller or landlord. *Veteribus placet, pactionem ob-*

Digest. lib. 2.
tit. 14. De pac-
tis leg. 31.

scuram, vel ambiguam venditori et qui locavit nocere: in quorum fuit potestate legem apertius conscribere. In this respect the determination of the common law of *England* and the *Roman* law, are, in some instances, in opposition to the nature of things; for if the thing contracted about be burdensome to the party whose words are to be expounded, the interpretation to be agreeable to the intent, as the latter must be presumed from the nature of things, ought to be favorable to him; for every one seeks his own advantage, and consequently engages himself to as little inconvenience as possible; whereas, according to the construction alluded to, he is presumed to have bound himself as strictly as the words in their largest sense will effect.

Therefore, perhaps, we should come nearer to truth, if we were to hold, that the contracting party, for whose benefit the agreement is burdensome to the other, is he who * should either explain himself, or make the other explain himself, with all the clearness necessary to prevent ambiguity or obscurity. Therefore the construction should always go against him.

[* 397.]

Indeed, in some instances, construction is, in the law of *England*, made according to the rule last-mentioned. That is, where the contract or agreement contains something in its nature odious; of which kind are all contracts that carry a penalty with them; or lay the charge on one party only, or on one more than on another.

Dyer 17. a.
5 Rep. 22. a.
Vide exception
5 Rep. 23. b.

Upon this principle, words or sentences used in the condition of a bond, which, considered simply in their own nature, are equivocal or ambiguous, shall generally, in respect of the object of the condition, be taken in ease and favor of the obligor; the reason for which seems to be, that they are inserted for his advantage, and to discharge him from a penalty.

Dyer 17. a.

Therefore if a man be bound to another upon condition to pay 10*l.* before the feast of *Saint Thomas*, and there

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there are two feasts of *Saint * Thomas*. The money [* 398.] shall be due on the last feast and not on the first, for that is most beneficial for the obligor.

Upon this principle it has been determined, that where the condition of a bond consists of two parts in the disjunctive, and *both* are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part; for he hath election to perform the one or the other for the saving the penalty of his bond; and when one part is become impossible by the act of God, it is as beneficial to him as if that part of the disjunction, which is become impossible, had been only the condition of the bond: and therefore, when one alternative becomes impossible by the act of God, so that by no industry the obligor can perform it, the bond is saved.

So where debt was brought on an indenture to recover 2200*l*. whereby the plaintiff covenanted with the defendant to assign to him, or any other whom he should appoint, on the 30th *January* next following, ten shares in the corporation of the linen manufacture; and the defendant covenanted with the plaintiff to * accept them the said 30th of *January*, and at the same time to pay the plaintiff 1100*l*. A question arose out of the pleadings, whether the assignment ought to precede the payment of the money? and it was argued that it ought; because the covenant was in nature of a condition or defeazance to save the forfeiture of the 2200*l*; and, then, if the condition could have two intendments, the better for the obligor should be taken; and, therefore, the payment of the money should refer to the acceptance of the assignment, and not to the day on which the assignment ought to have been made. So that the legal construction of the deed would be, that the plaintiff should assign and transfer the shares on the 30th of *January*, and that the defendant should accept it, *and on such acceptance the money be paid*. And of that opinion were the court.

Upon the same principle it is said, if one be bound to make to a man a sure, sufficient, and lawful estate in certain lands, by the advice of J. D.; if he make an estate to him according to the advice of J. D. be it sufficient or not, lawful or not lawful, yet is the bond saved.

Another

5 Rep. 22.
10 Mod. 26.
W. Jones 29.
Cont. Salk. 170.

Elwich v. Cudworth, 1 Lutw. 490.

(* 399.)

7 E. 4. 13 b.
Pl. 4. Fitz. tit.
Dett. 81.

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[* 400.]
Co. Litt. 42.

* Another exception to the rule of accepting ambiguous words most strongly against the speakers, is, where such construction will work a wrong to others. And, therefore, if tenant in fee make a lease for life, without expressing for whose life, it shall be intended for the life of the lessee. Yet if tenant in tail grant a lease in such terms, it shall be taken for the life of the lessor; because, otherwise, it would work a wrong to the reversioner.

Bro. Exposition
des terms 39.

Subject to the above observation, words are to be understood in the most comprehensive sense in which they are generally accepted; as the masculine is to be understood as including both genders. Thus the word Men shall extend to women as well as men.

So if a licence were given to kill any beasts of chase in such a forest except Bucks; under that name Does also ought to be comprehended, for when we speak of a buck, or any other creature in the masculine gender, which is the more noble, it comprehends the female as well as the male, unless there be some circumstance which shews plainly, that we speak of the male in opposition to the female.

[* 401.]

* And an indefinite expression shall be understood universally, unless there be otherwise some reason to restrain it.

19 H. 6. 42.
Hetley 9.

Thus if two persons have goods in jointure, and give all their goods, not only those they have in jointure, but their several goods also pass. So if two grant their rents, their several rents, as well as those which they have jointly, pass according to their several interests.

1 And. 57.

Again, if one reciting that he is possessed of divers ewes, give them to me, the gift shall extend to all the ewes which he that makes it is possessed of. But if one be bound to prove that divers men were at such a place, if he prove that two were there, he has performed the condition; for he proves that two were there, in which number is contained divers.

Ibid.

So if a covenant be to make an assurance of divers lands, it shall be construed of the whole or part according to the intent.

Cooke v.
Founds,
1 Lev. 49.

Again, where one bargained and sold lands that he had purchased of W. and covenanted that he was seized
of

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of a good estate in fee * according to the indenture made to him by W. In covenant it was assigned for breach, that he was not seised of a good estate in fee. The vendor pleaded that he was seised of as good an estate as W. conveyed to him; upon which there was a demurrer. And it was held good: for the covenant was absolute, that he was seised of a good estate in fee, and the reference to the conveyance of W. imported only the certainty of estate, not the title. [* 402]

If a man speak in legal language, his words shall be taken in their most comprehensive signification; so as not only to import what they do in ordinary language, but also to include whatever they signify in that sense, which the law has imposed upon them.

Thus a limitation that a man's *heir* shall have his land, as long as he pays such annual payments; and that if *his heir* do not pay, then A. B. shall have it, extends to *all* his heirs successively: for the grantor is supposed to know the force and extent of the terms and, knowing them, is concluded to have used them without restriction, unless there be some probable reason to induce us to believe his mind did not go to their full extent. Vide Roll 253. E. 25. 35.

* And, in expounding contracts and agreements, the construction, as has been said, is made of them, which is consonant to the general intent, as it appears in the context. [* 403.]

As if the vendor of a lease covenant and grant, that he has not made or done any former grant, or other thing by which the then present grant or assignment may be in any manner impaired, hindered, or frustrated; but that the assignee and his executors, by virtue of the said grant or assignment, may quietly have, hold, and enjoy, all and singular the premises, with their appurtenances, during the term to come, without any hindrance or disturbance by him, or *any other person*: the latter words must be taken with reference to the former words; and it is no breach, if the assignee be disturbed by *any other person*, if it be without the *act* of the *assignor*. Broughton v. Conway, Dyer 240. Moore 58.

Again, if one covenant that lands are of the value of 1000*l. per annum*, and so shall continue, notwithstanding any act done, or to be done by him; the words "notwithstanding any act," extend as well to the time of the covenant made, as to the time future; and, Rich v. Rich, Cro. Eliz. 43. Et Jervis v. Peade, ibid. 615.

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[* 404.] * and, though they be not *then* of that value, the covenant will not be broken, except some act done by the covenantor be the cause of it.

Dyer 255. Pl.
4.

So, if a bond be made with condition, "that, if the lessor, *suffer* the lessee from year to year during the term, quietly and peaceably to have, hold, and occupy the tenement and land aforesaid; and that without trouble, vexation, or denial of the lessor, *or any other person or persons*, that then, &c." This condition (notwithstanding the generality of the latter words) will not be broken by an entry of a stranger; because all the sequel of the condition has reference to the first word "*suffer*," which is passive: so that no act is to be done by the obligor, but only a sufferance of him, his executors and assigns, and that, notwithstanding the words, "and without trouble, &c." which only mean, that the obligee ought to enjoy the lease against all others, &c.; but if any procurement or occasion of disturbance be by the obligor, his executors, or assigns, then he has forfeited the obligation; and "that" refers to the word "*suffer*."

[* 405.]
Bony v. Taylor,
2 Roll Abr. 253.
H. 3.

* So, if a man make a feoffment to the use of himself for life, the remainder to another for life, the remainder to the use of the heir or heirs of his own body, and to the use of the heir of such heir or heirs, and, if he die without issue of his body, the remainder over; in this case, his heir shall take by descent: for, although *heir* be a name of purchase, yet, the words "or heirs" explain it, and make him in by descent of an estate tail.

Crookhay v.
Woodward,
Hob. 217.

Again; where a covenant was "to satisfy within three months after request, and due proof of embezzlement by an apprentice," it was held, that the word "proof," being left at large and capable of being made in court judiciously, in an action brought against the apprentice before the action brought upon this covenant made by another; it should be taken to mean a proof by trial in court. And it was agreed, that the word proof, generally laid, should be understood a proof judicial by jury, confession, or demurrer in court.

And in contracts or agreements, words may be transposed to give effect to the intent, where that is evident.

As,

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* As, if a lease be made the 6th of *August* for twenty years, rendering rent *annually* at *Lady-day* and *Michaelmas*; the law will transpose the sentence to *Michaelmas* and *Lady-day*: because otherwise the rent cannot be paid yearly. [* 406.]
Co. Litt. 217 b.

In contracts or agreements, the executors of the contracting parties are implied in themselves, and without naming; if, from the nature of the contract, it appear that the parties so intended.

Thus should one, possessed of a term for years, lease the same for years, and covenant for himself and his executors to renew the lease on the same rent, upon the request of the lessee within the term; if, in such case, the lessee should die within the term, and his executors should request the lessor to make a new lease before its expiration, and they should refuse, a court of equity would compel them: for the meaning of such a covenant is, that the lessee may be reimbursed any money that he may lay out in the improvement of the estate; and, therefore, it is immaterial, whether the lessee or his executors require the renewal of the lease, it not being personal. Hyde v. Steiner, 2 P. Will. 170.

* If money is to be paid by reason of a contract, the terms shall be understood and accepted according to their import where it is to be received; that is, it shall be paid in currency there. [* 407.]

And, therefore, if a contract be made in *London* to pay a given sum of money, as 100*l.* at *Dublin*, the contract will be performed by a tender of 100*l.* *Irish* currency; for, *Consuetudo et statuta loci, in quem est destinata solutio, respicienda sunt.* Davis 28.

So if money, arising out of an *Irish* estate, be made payable in *England*, it seems that it must be paid in *English* money. Vide 2 P. Will. 88. Ibid. 696.

And if a man advance money by way of loan, or if another detain his money unlawfully, by reason of which he becomes intitled to interest; that interest shall be according to the value of forbearance in the country, where the transaction arises.

Thus, where a bond was made in *England*, and sent over to *Ireland*, and the money was to be paid there, Sir John Oham- pant v. Lord Ranelagh, Pre. Chan. 128.

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[* 408.] but it was not mentioned * what interest was to be paid ; my lord keeper was of opinion, that it should carry *Irish* interest.

Ekins v. India
Com. 1 P.
Will. 396.

So, where the value of a ship and cargo was recovered on bill filed against the *India* Company, the transactions having happened in *India*, the master was directed to compute interest on the value, at the rate money bore in *India*.

And if the value of any thing be expressly stipulated in a contract, the value shall be intended as things are, at the time when the contract takes effect.

Vide Dyer,
81 b. 82 b.
9 E. 4. 49 a.

As if rent be to be paid at a given time, at which time a shilling is of the value of twelve pence ; and it afterwards become only of the value of six pence, as was frequently the case in former times : if the money be tendered at the time, the lessor shall not afterwards recover any more shillings, than would have paid the rent at the rate money was valued at, when the rent was due and tendered.

[* 319.]
11 H. 7. 5.
Dyer 82 b.
note 71.

* So, if one be to pay on such a day five quarters of corn ; and at the day of the contract entered into it is valued at 50/. and at the day of payment at 5/. he will be intitled either to five quarters of corn, or five pounds.

Speake v.
Speake, 1 Vern.
217. S. C. 1 Eq.
Ca. Abr. 221.
Pl. 7.

So, on a bill to have a jointure, defective in value, made good, the husband having covenanted that the lands settled *were* of a specific annual amount, it was decreed accordingly ; but the value of the lands was ordered to be estimated as they were at the time of the jointure settled, and not according to the value at the time of the decree.

Gardner v. Pul-
len, 2 Vern.
394. Sed quære ;
for here, the
bill was to be
relieved against
the penalty.

But if, by reason of improper delay, the value of the subject stipulated about is varied between the time of the contract being made, and its being performed, the loss must be borne by the party who was to carry the contract into execution : as if one were bound under a penalty to transfer stock at a given time, and he neglected so to do, and the stock rose in the mean time ; he should transfer the stock stipulated in specie, and not so much as it was worth, on the day when he ought to have transferred it.

And

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* And several deeds, made at the same time to effect one object, will be construed as one assurance; but so that each shall have its distinct operation, to carry on the main design. [* 410.]

Thus, where a father put his son apprentice, and entered into a bond of one thousand pounds for his fidelity, and, at the same time, took a covenant from his master that he should, at least once in a month, see his apprentice make up his cash: it was held, on a bill filed to be relieved against an action brought on the bond, that the bond and the covenant ought to be taken as one agreement; and, therefore, that the father should be answerable for no more than the master could prove the apprentice embezzled in the first month, when the embezzlement began. Montaguev.
Tidcombe,
Vernon 3 8.

So, where a man covenanted by marriage articles to pay the legacies charged upon his wife's estate, and gave a statute, and also a mortgage of his own estate, to secure the same; and by an indorsement upon the mortgage the same was to be void, unless the wife's estate was settled upon him for life, &c. according to the marriage articles; this * indorsement, though upon the mortgage only, was sufficient to discharge the statute and articles: for all the instruments being executed at one and the same time, authenticated by the same witnesses, and part of the same agreement, are all but as one conveyance. Treatise of
Equity, 49.
[* 411.]

Of disannulling, discharging, rescinding, waiving, or altering, Contracts or Agreements.

THE essence of a contract or agreement being the right vested in one party, and the obligation incurred by the other; it is clear that every contract or agreement between two or more parties may, at any time before it is to be executed, be rescinded by all parties dissenting or receding from the bargain: for the consummation depends upon the same consent on which the inception of the contract is founded.

Bacon's Maxims of the Law 91.

Therefore if A. contract with B. that if B. lay him into his cellar three tons of wine before *Michaelmas*, A. will send into his (B's) barn twenty quarters of wheat before *Christmas*; the parties may by their reciprocal assent, dissolve the contract at any time, before either of those days.

[* 413.]
Ibid.

* So, if two exchange land by deed, or without deed, and neither enter; they may annul the exchange, by mutual consent, so it be by deed, but not by parol.

Ibid.

Again, if a lessee for twenty years make a lease for ten years, and afterwards, take back a lease for five years, this does not inure by way of surrender; because a party lease derived out of a greater cannot be surrendered back again, but it inures by dissolution of the contract: for, a lease of land is but a contract *executory* from time to time of the profits of the land to arise; as a man may sell his corn or his tythe to spring, or to be received for several years to come.

Upon this principle an agreement may be waived with the concurrence of all parties.

Lady Laneshorough v. Ockthott, 2 Brown Par. Ca. 116. 5 Vin.

P. 8. Ca. 31. 2 Eq. Ca. Abr. 207. Ca. 2. Et vide 3 Chan. Rep. 116.

Thus, where lord and tenant had entered into an agreement for inclosing a piece of ground, parcel of a manor on which the tenants had a right of common. To effectuate this, the lord, by a separate instrument, had released each particular tenant from all quit-rents and other services; and the tenants, by another instrument of like date, consented to the inclosure,

OF DISANNULLING, &c.

* inclosure, and released all their right of common in the ground so to be inclosed. The inclosure was set about, but the hedges being privately thrown down, and other obstructions happening, the lord relinquished his design; and the tenants of the manor continued to enjoy their right of common and to pay their quit-rents, and do suit and service at the lord's court in the same manner, as if no such agreement had ever been made; but the instruments, which had been reciprocally executed in consequence of that agreement, were neglected to be cancelled. A question, afterwards, arose, between the alienee of the lord and a representative of one of the tenants, who had paid quit rent, &c. and enjoyed the common for five-and-twenty years after the agreement entered into, whether an instrument, given under this agreement, releasing the right of common, was a good bar to an avowry made upon a distress levied for arrears of quit-rent, due from the defendant as tenant of the manor; or, whether the subsequent transactions, viz the enjoyment of the right of common on the one hand, and the payment of the quit rent on the other, did not amount to a waiver of the agreement? and it was held that they did. [* 414.]

* And, in some cases, *one* of the parties alone may [* 415.] rescind the contract: as in sales with liberty of refusal.

Thus, if any thing be purchased and paid for, but on condition to be returned on certain events stipulated; there, on the event happening, the thing purchased may be returned by the one party, and, upon the return, the contract is annulled by virtue of the *original* terms thereof, without any actual reacceptance or subsequent assent of the other party; for he has no option to refuse to take the thing so sold back. And upon the ground that the contract is annulled, the party having paid his money, and on such a contract, may, on the return of the thing sold, recover it back on an action for money had and received. Towers v. Barrett, 1 Term Rep. 135.

But, in contracts executed and consummate, if the first parties have put it in the power of a third person, ^{91.} or of a contingency to give perfection of their acts, they have, thereby, put them out to their own reach and liberty. They, therefore, cannot then rescind or revoke them: as if I contract with you for cloth at

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[* 416.] such a price as J. S. shall name, there, * if J. S. refuse to name, the contract is void: but the parties cannot annul it; because they have put it in the power of a third person to perfect.

Ibid. 92.

So if I enfeoff J. S. to the use of such an one as J. D. shall name within a year; there, if J. D. name A. B. it is not revocable: because the use passeth presently, and the contract is executed by operation of law.

Ibid. 91.

1 H. 7. 14. 15.

Bro. tit. Bar. 69.

After the time that a contract or agreement is stipulated to be performed is past, there is a perfection given it by action on the one side, that renders it indissoluble, and not to be annulled. But it may still be released; there being a difference between dissolving the contract, and a release or surrender of the thing contracted for.

A release may be either express or tacit. The former is accomplished by a regular acquittance or discharge. The latter is, where the party, in whose favor the obligation arises, cancels the obligation, by destroying the instrument by which it may be proved, or the like.

[* 417.]

* If he, who is to be benefited by another's fulfilling his contract or agreement, is the occasion why it is not carried into execution; the contract or agreement is thereby entirely dissolved, and the party bound discharged from his obligation.

8 Rep. 92.

Co. Litt. 206.

Therefore if the condition of an obligation be, that the obligor shall enfeoff the obligee of *certain* land before such a day; and then before the day, the obligee disseises the obligor, *and keeps the land by force* until after the day, so that the obligor cannot enter: this will excuse the performance of the condition.

35 H. 6. tit.

Barr. 162. cited

8 Rep. 91.

So, if one lease a house, by indenture, on condition that the lessee shall not permit any lewd woman to reside within it, if he be warned thereof by the lessor; and that, if he do not turn her out within six weeks after warning by the lessor or his servant, that the lessor shall re-enter: the lessee may plead, that the lessor ousted him with force, and, against his will, put such woman into possession, and made her continue there with force, against the lessee's will, for six weeks, &c.

18 E. 4. 8. b.

So, where one covenanted, by indenture, to build

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* build him a house of certain dimensions within a certain time for ten pounds, and an action of covenant was brought for non-performance of the contract; the defendant pleaded, that he went and was ready to have built the house, and that the plaintiff commanded him that he should not build it, by reason of which he left it undone: and, on demurrer, *Littleton* held this a good plea; for, if the carpenter had come on to the plaintiff's premises after this command, the plaintiff might have had an action of trespass against him for his entry; and, therefore, the commandment was a sufficient discharge to the carpenter. [* 418.]

So where a lessee for five years covenanted to build a mill within the term, and because he had not done it, the lessor brought an action of covenant; it was held a good plea to say, "that the lessor *forcibly* held him out during the last three years of the term, so as that he could not build it." Godb. 70.
18 E. 4. 2. b.
Pl. 6.

And where a lessee for years covenanted to drain the water which was upon the land, before such a day; and, afterwards, the lessor entered before the day and held him out and * disturbed him in doing it: this disannulled the covenant. Carrell v. Read,
Cro. Eliz. 374. [* 419.]

Again, it is held, upon the same principle, that if A. be bound to B. that J. S. shall marry G. before such a day; and, before the day, B. marries her, he shall take no advantage of the condition: because, by his (B.'s) means, it could not be performed. Co. Litt. 206. b.

So if A. be bound to B. in a bond, conditioned to convey to B. his manor, of *Dale* at such a day; and at the day, A. come to B. and tender him livery and seisin, and he refuse: A. is discharged for ever. 18 E. 4. 9. a.
Pl. 12.

And if one be bound to me in 20*l.* upon condition to pay 10*l.* at the feast of *Easter*; and, at that feast, he offer me the 10*l.* and I refuse, the bond is discharged for ever. Ibid.

So if a man be bound to appear at a day, and, before the day, the obligee cast him in prison, the bond is void. Noy's Max. 12.

And, in such cases, the party bound to performance will be in the same condition as if the agreement had

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[* 420.] been fulfilled by him: for, * *if he whom it concerns to have my part of the covenant fulfilled, is the occasion why it is not, it is the same thing to me as if it were fulfilled.*

Co. Litt. 210 b.

Thus, if a man make a feoffment in mortgage, upon condition to be void upon payment of money by the feoffor, &c. to the feoffee, at a day; if, at the day, the feoffee is out of the realm, the feoffor is not bound to seek him, or to go out of the realm to him: and then, because the feoffee is the cause that the feoffor cannot tender the money, the feoffor may enter into the land, as if it had been duly tendered.

18 E. 4. 8. b.
Pl. 12.

So, in the case before stated, where a carpenter covenanted to build another a house upon his land for 10*l.* and came prepared so to do, but was ordered by him to desist: the carpenter, after such command to desist, might have maintained an action for the 10*l.*

The *right* accruing by virtue of a contract or agreement, may also be lost by abandonment.

[* 421.]
Orby v. Trigg,
9 Mod. 2. 3.

Thus, where one mortgaged lands, and, in * the deed of mortgage, there was a covenant to re-convey upon six months notice of the payment of the principal sum and interest; and also a covenant that, in case the estate was to be sold, the mortgagee should have the pre-emption, (it appearing, that, after the death of the mortgagor, an agreement had been entered into for the sale of the estate to another person, and that neither that person, nor the heir of the mortgagor, knew any thing of this covenant, the counterpart of the mortgage deed having been delivered up to the attorney of the mortgagee, who had denied giving any copy, but had insisted on payment of the principal and interest, on the ground that the security was too narrow for the money he had lent, and threatened foreclosure; but had never mentioned, that the mortgagee was to have the benefit of pre-emption, until after the estate was sold) it was held, that he should not claim it to the prejudice of the purchaser and the heir, after having had so long a time in which he might have so done before the estate was sold. And the court decreed accordingly.

Powell v. Hankey, et al, 2 P. Will. 82.

And, upon this principle, it has been held, that, if a binding

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binding agreement be entered into * by husband and wife, previous to their marriage, respecting her property, the effect of which is to give her an exclusive right to it as her separate estate; yet, if she constantly permit her husband to receive the interest of it, if it be personal estate invested in the funds or securities; or the rents and profits, if it be a real estate; the law will intend that she consented to her husband's receipt of it: and a contrary inference would be hardship on the husband, who probably depending upon the wife's permitting him to receive this separate estate as a gift, may, on such a presumption, have lived in a more plentiful manner, the comfort wherof the wife must have shared in; and if she, at a future period, were allowed to make her husband debtor for this money, this might ruin the husband; or, in case of his death, prove equally prejudicial to his children. [* 422.]

But this intendment of law, may be rebutted by *Ridout v. Lewis*, parol proof, that the wife had no design to abandon her right to such separate estate. And, therefore, where a woman had 300*l. per annum* settled upon her as pin-money, of which 200*l. per annum* only had been paid her by her husband for some years * before his death; *1 Atk. 269.*

she was, on a bill filed in Chancery for that purpose, let in to have the arrears made a charge on her husband's assets, on producing evidence, that often, on her complaining of being paid short, her husband had told her, that she should have it at last. [* 423.]

A contract of a lower degree, may likewise be determined or annulled, by accepting a contract of a higher degree for the same thing.

And, therefore, if a man be indebted to me by simple contract, and, afterwards, enter into a *bond* or *obligation* to me for the same debt; the simple contract is thereby determined: for, otherwise, the debtor would be doubly charged. 6 Rep. 45. Dyer 21 b. Bro. tit. Contract. 29. 3 H. 4. 17 b. 1 H. 6. 8. a. 10 H. 7. 21 a. Fitz. Nar. Brev. 281.

(a) So, a judgment obtained, determines a contract for the same sum. Therefore, if a man recover in debt upon a contract, and omit to take out execution, yet he cannot have a new action of debt upon the contract; because the nature of the duty is changed by the judgment of record. Contra, if a stranger give bond for the debt, vide *ibid.* note (d.) Fitzh. Abr. tit. Debt 83. Dyer 230 b. or, if the deed be only indented and sealed, and not delivered or made an especialty, Fitzh. tit. Debt 68. 1 H. 6. 82.

But

(a) 6 Rep. 45. 9 E. 4. 50 b. 51 a.

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[* 424.] But contracts of equal degree do not *extinguish or determine each other; and therefore, a bond given for the same debt for which another bond has been previously given, is not sufficient to avoid the former: for its operation is but to give another action upon a bond. And, *a multo fortiori*, a new bond is not sufficient to discharge a judgment.

Vide Lutterford v. Peter le Mayre, Cro. Jac. 579. et vide Cro. Eliz. 817. Bro. tit. Contract, &c. 38. 21 H. 4. 79 b. 13 H. 4. 1. 6 Rep. 45.

And, upon the same principle, it is held that, if the obligee in a bond accept of a bond in nature of a statute staple for the same debt, and in full satisfaction of the bond, yet this is no discharge: for, a statute staple, or bond in the nature thereof, is but a bond recorded; and one bond, be it of record or not of record, cannot merge another.

Preston v. Per- So, if two records be of equal degree, the one can- ton, Cro. Eliz. not determine the other. And, therefore, where a

817.

[* 425.] *scire facias* was brought in Chancery upon a recon- fance there, and the defendant pleaded to issue, and the issue was sent to the King's Bench to be tried, and found for the plaintiff, and judgment given for him there: and then, the plaintiff brought debt in the com- mon bench upon this judgment, and had * judgment there also to recover; and, afterwards, brought a *scire facias* in the King's Bench, to have execution upon the judgment; the latter recovery was pleaded in bar of that execution, whereupon the plaintiff demurred. And the court held that it was no plea; because the one judgment cannot determine another judgment which is of equal nature, no more than one obligation can determine another.

Vide supra, X 217—223.

And we must, carefully distinguish between cases where the insertion of parol contracts or agreements in deeds, is merely by way of recital, or with a view to corroborate them, and enlarge the remedy for enforcing them; and cases of the nature before alluded to, where the contract itself is intended to be put under seal, and turned into a specialty: for, in the former cases, the specialty does not alter the nature of the contract; but the party having a right to require performance, may, at his election, proceed either on the parol contract, or the specialty.

Contracts, entered into by deed, cannot be dis- charged or disannulled, by act of the party, by parol: therefore,

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therefore, the merely *delivering up of an indenture [* 426.] of covenant, bill, or bond to pay a sum of money, ^{1 H. 7. 14. 15.} will not discharge or avoid the obligations created by ^{Bro. tit. Bar. 69.} them. Consequently, it is no plea to an action of debt ^{Cro. Jac. 99.} upon bond, &c. to say, that the obligee re-delivered the ^{Lutw. 358.} bond to the obligor in lieu of an acquittance, if the ^{contra Roberts v. Stoker.} obligee has regained the possession of it. And, upon ^{2 Rolls Rep.} the same principle, accord and satisfaction is no discharge ^{110. S. C. Pal-} of a covenant; for a covenant, being created by deed, ^{mer 110.} cannot be discharged but by deed.

Nay, even payment itself is no plea to a bond; for it must be discharged by matter of as high nature as itself; and, therefore, admits of no plea of any act of the obligor, but that of a release under seal.

But, where a wrong, or default subsequent, together with a deed, gives an action to recover damages (which are only in the personalty) for such wrong or default; there, the damages may be discharged by matter of fact or parol: as if one by indenture of lease, covenant to repair and maintain houses in reparation, from time to time during the term demised; in such case, accord and * satisfaction is a good discharge for the damages demanded, by reason of the breach of the covenant: but the covenant remains. <sup>Snow v. Frank-
lin, Lutwich
358. Alden v.
[* 427.]
Blague, Cro. Ja.
99. et Blake's
case, Noy. 110.
S. C. 6 Rep. 43.</sup>

Although it be generally true that, at law, a parol agreement will not be admitted to contravene the terms of an agreement contained in a deed, or any other agreement in writing; yet, in some cases, it is otherwise in equity: for there it is held, that parol evidence may be admitted to rebut an equity; and, a specific execution being an equity, those courts will, under some circumstances, admit parol evidence to shew, that a written contract or agreement has been waved in part, or in the whole, or varied in the terms of it, by a subsequent parol agreement. As if, after a mortgage made with interest reserved at five *per centum*, the mortgagee, upon representation by the mortgagor that the estate will not afford to pay so high an interest, agrees to reduce it to such rate as a third person shall name, and the third person mentions three *per centum*, and that is assented to: in such case, the latter agreement, although by parol, will control the former. And, if there be any denial of it, a court of equity will direct an issue to ascertain the fact. <sup>Lord Milton v.
Edgworth, 6
Bro. Par. Ca.
580.</sup>

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[* 428.] * Upon this ground the lord keeper, in the case of *Gorman v. Salisbury*, 1 Vern. 240. dismissed a bill, which was brought to have an agreement executed in specie.

So in the case of *Legal and Miller*, it was held, that an agreement bearing hard upon one of the parties was waived; a new and different agreement by parol being shewn.

And such new agreement by parol, if in part executed on one side, will be decreed to be specifically performed on the other.

5 Vin. Abr. 522. Thus, where W. leased an house to N. for eleven
Pl. 38. 2 Eq. Ca. years, and was to allow 20*l.* to be laid out in repairs:
Abr. 48. 16. the agreement was reduced into writing, and executed by both parties. N. repaired the house; and finding that it would take a much greater sum than the 20*l.* told W. of it, and that he would nevertheless go on and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen years, or as many as N. should think fit. W. replied, that they would not fall out about that. W. afterwards declared that he would enlarge the term, without mentioning any

[* 429.] time in certain. On a bill to * compel an execution of the agreement according to these latter terms, the Master of the Rolls said, that, before the statute, written agreements could not be controled by parol agreements of a contrary import, or altering them, but that this was a new agreement; and the laying out the money was a performance on one part, and that, therefore, it ought to be carried into execution on the other part.

Vide infra. But we must carefully distinguish these sort of cases, from cases of secret agreements, made to impose upon parties to other agreements, by altering the terms of them.

In all cases where parol agreements are set up, in equity, to shew a waiver or alteration of contracts in writing respecting lands, a very clear proof of the former will be expected; for the statute of frauds and perjuries requires, "that all contracts and agreements concerning lands, &c. should be in writing." Now, an agreement to waive a contract for a purchase, is as much an agreement concerning lands, as the original contract itself is. And Lord *Harwicke* thought, that proof of a parol waiver of an agreement for a sale
of

Per Lord Hard.
in *Buckhouse v.*
Crosby, 2 Eq.
Ca. Abr. 32, 33.

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* of land by two persons (one of whom was then tenant [* 430.] of the land, and paid rent to the person on whose behalf the waiver was, and who was mortgagee of the estates; and the other of whom was proved to have declared that he was to share in the purchase) was insufficient to discharge a contract in writing.

And where, a decree having been made, the defendant to a bill to execute the decree, by way of answer, set forth a parol agreement in bar, to which the plaintiff demurred; the demurrer was allowed, though the agreement was subsequent to the decree: for, it was said, that the decree should proceed, and if the defendant would have advantage of the agreement, he must bring an original bill; because, if he should have advantage of it by way of defence, one witness would serve his turn; but, if the defendant in his answer to an original bill denied the agreement, one witness would not convict him: so that, by this way of answer, the plaintiff in this suit would lose the benefit of his answer in an original suit, instituted upon the latter agreement.

Wakelin v.
Wakelin,
2 Chan. Ca. 8.

But, it is not only contrary to the letter * and spirit [* 431.] of the statute of frauds and perjuries, but to the rules of the common law before that statute was in being, to add any thing to an agreement in writing which is complete, and reduced into deeds and writings; by admitting parol evidence to explain it to have been meant to operate otherwise than the language in which it is convinced imports: and, therefore, such evidence ought in all cases to be laid aside, and no advantage taken of it on either side.

Thus, where the portion of a wife appeared by settlement, made on her marriage, to have been 5,300*l.* and it was proved that, at the time the settlement was executed, the wife gave a bond, signed by her, to the husband's father, in the penalty of 1400*l.* for securing 700*l.* but the husband in his own hand wrote at the bottom, *I own this to be my debt*: Lord Hardwicke was of opinion, that he was obliged to lay out of the case all parol evidence that had been read to explain this transaction, and that no advantage ought to be taken of it on either side.

Patericke v.
Powlet, 2 Atk.
384.

So where, on a bill brought for dower the defendant, the

Tinney v. Tinney,
3 Atk. 8.

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[* 432.] the heir at law, insisted, on * the husband in his lifetime gave a bond in the penalty of 1000*l.* in trust to secure to his wife 500*l.* in case she survived; and that it was intended at that time in lieu of dower; and that she acknowledged it to be so; and offered to read evidence of her acknowledgment: the lord chancellor was of opinion, that parol evidence could not be allowed in this case, it being a case within the statute of frauds and perjuries.

But we must be careful to observe the distinction, between instances of the nature of those last-mentioned, where the evidence offered is to explain a written agreement, complete in itself; and cases where parol evidence is offered to shew, that something, intended to be inserted in an agreement, has been omitted by mistake or fraud: for the latter is a very common defence, in a court of equity, to a bill for a specific performance; and there is no doubt but that such evidence ought to be received; and it is quite equal, whether it be insisted upon as a mistake or fraud.

Joynes v. Sta-
tham, 3 Atk.
388.

[* 433.] Thus where a bill was brought to carry into execution an agreement for a lease of a house during the life of the defendant's wife, * which was written by the plaintiff and signed by the defendant, the lessor only, who could not write, but made his mark. The defendant insisted by his answer, that there ought to have been a clause inserted in the agreement, that the tenant should pay the rent clear of taxes; but that the plaintiff having written the agreement himself, had omitted it; and that the defendant, unless this had been the agreement, would not have sunk the rent as he had done from 14*l.* to 9*l.* *per annum*; and the defendant offered to read evidence to shew that this was part of the agreement. And it was said, that this evidence ought to be rejected, as contrary to the statute of frauds: but Lord *Hardwicke* allowed the evidence of the omission in the lease to be read.

Ibid. 389.

So if, on an agreement for a mortgage drawn by the mortgagee the mortgagor being a *marksman* (that is, unacquainted with the art of writing) the mortgagee omit to insert a covenant for redemption, the mortgagor will, in such case, be at liberty, in a court of equity, to insist upon reading evidence to shew the omission.

So,

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So, if a mortgage be drawn in two deeds, * one an [* 434.] absolute conveyance, the other a defeazance; and there be an omission by the mortgagee to execute the defeazance: the mortgagor shall be permitted to shew the mistake.

Again, where, by agreement, the South-sea company were not bound to answer for any irregularity by supercargoes, unless information was given in two months after their return home; the instrument was drawn up on board the ship and in a great hurry, and executed there by the party, who, when he got out to sea and read it over, found it was six months instead of two, and brought a bill to be relieved against the variation in the instrument; Lord King sent it to an issue on the question, Whether it was the original agreement that it should be two instead of six months? and the verdict being in favor of the plaintiff, that the agreement was designed to be in two months, a decree was made to relieve the plaintiff against any difficulty by that variation.

But the true ground upon which the last-mentioned decisions appear to me to rest, is, that the proof offered is *no variation* of the agreement, but consistent therewith, and * explanatory of it only; and that strong circumstances of fraud or mistake pervade all of them: for such evidence is never suffered to contradict or explain away an *explicit* agreement; because that is, in effect, to vary it in respect of things *specifically expressed therein*: and courts ought to be very cautious in admitting any evidence to supply or explain written agreements in specific circumstances expressly stipulated; for otherwise, the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the primary object. [* 435.]

Thus where M. and H. had the occupation of certain closes of lands belonging to M. called A. Close and B. Meadow; and C. and his partner came to an agreement with them, by a memorandum in writing signed by all the parties, and attested by one D. whereby C. and his partner agreed to exchange their coppermill, &c. with M. and H. in consideration of the grass and vesture of hay to be taken by C. and his partner off B. Meadow, and articles were to be made accordingly; but no mention was made in the agreement respecting A. Close,

Meres, et al. v.
Ansell, et al.
2 Will. 275.

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[* 436.] Close, and only of * a special particular interest in B. Meadow. Upon this transaction a question arose at *nisi prius* on an action of trespass, whether C. and his partner were not entitled to the possession of A. Close, as well as the hay of B. Meadow? and to substantiate this claim, D. the subscribing witness, was called, and proved the written agreement, and further deposed that it was, at the time of signing the agreement, agreed by the parties by parol, that C. and his partner should not only have the hay off B. Meadow, but also the whole possession of the soil and produce of A. and B. And the question was, whether this evidence was admissible? *Et per curiam*, We are all clearly of opinion, that no parol evidence is admissible to disannul and essentially to vary a written agreement.

Preston v.
Merceau,
Blackst. Rep.
1249.

[* 437.] Upon the ground of these distinctions it was also decided in the court of Common Pleas, on an action on the case for use and occupation of an house, of which it was agreed in writing, a lease should be let by A. to B. for twenty-one years, at 26*l. per annum*, to commence, &c.; that parol evidence, offered by the plaintiff on the trial, to shew that, besides the 26*l. per annum*, the defendant had * agreed to pay 2*l. 12s. 6d.* a year, being the ground-rent of the premises to the ground-landlord (but no evidence offered of the actual payment of such ground-rent) was inadmissible. And there upon Lord C. J. *De Grey* nonsuited the plaintiff. And on motion to set aside the nonsuit, the rule was discharged, *Blackstone* and *Nares* Just. observing, that this was a positive agreement that the tenant should pay a specific rent of 26*l.* could the court then admit proof that this meant 28*l. 12s. 6d.* It was nothing to the tenant to whom the rent was to be paid, if he was obliged to pay more than his contract expressed. The court could neither alter the rent nor the term, the two things *expressed* in the agreement. With respect to collateral matters it might be otherwise, the plaintiff might shew who was to put the house in repair, or the like, concerning which nothing was said; but he could not, by parol evidence, shorten the term to *fourteen*, or extend it to *twenty-five* years, or make the rent other than 26*l.* a year. *Blackstone*, Just. said, that the case of *Joyes* and *Statham*, was the case of a mere executory act, in which the master was to settle the proper covenants, and therefore had a right to enquire who

was

Supra 432.

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was to pay the * taxes. Besides, there were strong [* 438.] suggestions of fraud in making the written agreement, as one party could neither read nor write.

And, except in the instances before-mentioned, the 2 Will. 276. rules of evidence are universally the same in courts of law and courts of equity. Therefore if, in the before-mentioned case of *Meres* and *Ansell*, a bill had been ^{Supra 435.} filed in equity for a specific performance of the agreement; the court would not have admitted the parol evidence there tendered.

But to return to the subject of disannulling contracts or agreements.

Where the right and obligation meet, and unite in the *same* person, the contract, generally, is thereby dissolved; for, since a man cannot be *his own* creditor and debtor, it follows, that if a man becomes representative to his debtor, his action ceases, there being no object on whom it can attach. This is termed in the civil law *confusion*. Therefore, if the creditor make his debtor his executor, the debt, as *between them*, is vanished.

So, if a man be bound in an obligation to * a feme [* 439.] sole, and afterwards take her to wife; the contract is, ^{H. 7. 16. a b.} dissolved, by act of law, by the union of the right; and the obligation in him.

Again, if a man had been indebted by bond to a ^{Ibid.} villain, and had afterwards purchased the manor to which he was regardant; the obligation had, by act of law, been gone.

And, since the statutes for setting off mutual debts ^{2 Geo. 2. cap. 22. 8 Geo. 2. cap. 24.} have been enacted, contracts creating debts, may, in cases where the sums are equal (provided the debts are of the same nature) be extinguished by compensation: as by opposing debt to debt, whereby a man ceases to owe me, because I owe him *as much* of the same kind, by a contract of the same nature. For, since, where debts are mutual, I must, if I receive, immediately refund as much; the legislature, to abridge such needless payment, allows each party to pay himself by retaining his own, and to plead the one in bar to an ac- ^{Bull. ni. pri. 179.} tion for the other.

But where the sums are unequal, there, the lesser must be set off, and will be a discharge of the contract *pro tanto*.

But,

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[* 440.]

Ibid.

* But, this mode of compensation does not take place, except between those who are creditors and debtors to each other in their own right; and, therefore, a debt, due to a man in right of his wife, cannot be set off in an action against him on his own bond.

Ibid.

So a set-off cannot be pleaded to a bail bond, not assigned to the party; because it is not within the 8 Geo. 2.; for that statute relates only to bonds conditioned to pay money, and not to bail bonds: nor is it within the 2 Geo. 2.; because the plaintiff does not bring the action in his own right, but as trustee for another.

Ibid.

But, if there be mutual debts subsisting between a man's testator and J. S. The executor will be indemnified in setting off J. S.'s debt against his testator's without bringing an action against him; for, so far the executor and his testator may be esteemed the same person: and, therefore, compensation may take place between him and his testator's creditor, in like manner as if his testator had been living.

[* 441.]

It was formerly doubted, whether marriage was not an act of such a nature, as to *extinguish any contract or agreement made between the intended husband and wife previous thereto, where no trustee was interposed.

Dame Darcy v. Chute, et al.
1 Ch. Ca. 21.
S. C. 3 Chan. Rep. 4. Et. vide S. L. Pridgeon, v. Pridgeon, ibid. 117.
Heeding v. Davis, Skinner 409.
Quære, If here was not an abandonment by the wife?

Thus where B. (A. being a widow, and seised of a jointure worth 700*l.* *per annum*) made suit to her to marry her, and, she agreeing to it, he, before the marriage, agreed with her, by deed in writing, that it should be lawful for her, or such person as she should appoint, during the coverture, to receive and dispose of the rents of her jointure as she pleased; the deed was put into the hands of a person who had formerly been A.'s agent, and after the marriage, A.'s agent uniformly received the rents of the jointured lands, and constantly, with the approbation of A. accounted for, and paid the same to B. but after B.'s death, A. exhibited a bill against her husband's executor and the agent, charging 1000*l.* to have been received in B.'s life-time, and to be resting in the agent's hands unaccounted for, to which she made title under the agreement made between her husband and herself before marriage: upon the hearing the court declared, that this agreement made before marriage with A. herself,

was

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was immediately by the * marriage extinguished, and [* 442.] refused relief thereupon.

But a distinction was made, at law, between a promise which was not to be executed until after the coverture determined, and a promise to be executed during the coverture: the former having been held not to be extinguished by the marriage, as the latter was clearly held to be.

This point appears to have been first agitated in the case of *Smith* and *Anne*, his wife, against *Stafford*; Smith, et uxor, v. Stafford, Hob. 216. wherein the former declared that, upon speech of marriage had between *Anne* and the defendant's testator, he promised if she would marry him, and he died before her, he would leave her worth an hundred pounds; and that she did marry him, and that he died and left her not worth an hundred pounds. And, upon non-assumpsit and verdict for the plaintiff, it was moved in arrest of judgment, that the promise was released, in law, by the marriage: against this it was objected, that the action could not arise during the coverture; for it was not to be performed until after the death of him who made the promise. And, on this ground, * it was held by three judges, against the opinion of *Hobart*, [* 443.] that the action well lay.

A similar judgment was affirmed in a writ of error in the Exchequer Chamber, in the case of *Clarke* and *Thompson*, the above case being there cited as in point. Clarke v. Thompson, Cro. Ja. 571.

And, in the case of *Gage* and *Atton*, it was held by *Gage v. Atton*, Salk. 325. *Gould* and *Turton*, Justices, against the opinion of *Holt*, C. Justice, that a bond conditioned to be void, "in case the obligor and obligee intermarried, and the obligee survived, and the obligor left her 1000l" was not extinguished by the marriage; because to avoid it would subvert the marriage agreement. And they held, that the debt was only suspended, and the rather, because it was not payable during the coverture, but was a debt on contingency; so that if the feme *dum sola* had released all demands, the debt had not been extinguished.

And, in the case of *Pridgeon* and *Pridgeon*, a like distinction was taken in equity, between an agreement betwixt baron and feme made before marriage; that the wife might, by will, dispose of part of her estate, or Pridgeon v. Pridgeon, 1 Ch. Ca. 117. Et vide Smith v. Stafford, for Hob. 216.

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[* 444.] for a thing * which was *future* to the marriage, and an agreement which was to be carried into execution *during the coverture*: inasmuch as, in the former case, the agreement was held not to be dissolved thereby, upon the ground that it was no duty during the coverture; whereas, in the latter case, the agreement was extinguished by the marriage.

And since agreements, for settling estates to the separate use of the wife on marriage, have become very frequent, courts of equity, and also courts of law, have viewed the stipulation entered into by the parties on the occasion of marriage in the most liberal way; and it is now undoubtedly settled that, where there is an agreement between husband and wife *only*, before marriage, that the wife shall have to her separate use either the whole or particular parts of her personal estate, she may dispose of it by act in her life, or by will, and that by either of these modes, though nothing be said of the manner of disposing of it.

Contracts and agreements may also be annulled or altered by act of the legislature; for, in all cases of contracts and agreements, the parties must be supposed not to have consented, * but under a tacit condition that they shall be discharged, if the state throw any obstacle in their way.

Winnington
v. Briscoe.
8 Mod 51.
Et vide Bowes
v. Lord Shrewsbury, 5 Brown
Par Ca. 269.
Et S. C. supra.
Et. Stent v.
Bailes, 2 P
Will. 218.

Thus where A. brought 10,000*l.* South-sea stock of B. on the 10th of *August* 1720, for which he agreed to pay 11,250*l.* and had paid 3000*l.* part of the money, and B. promised to give him receipts for the 10,000*l.* stock as soon as the books of the company were open; but, before they were opened, an act of parliament was made, prohibiting any more receipts to be given out, &c. Whereupon A. brought his action against B. for the 3000*l.* he had paid A. as so much money received to his use; the question was, whether the failure to deliver the receipts should subject B. to this action; or whether B. might not have an action against A. for the remaining 8250*l.*? and the court was of opinion, that the agreement, having become impossible to be performed by reason of the act of parliament intervening, should prejudice neither party.

But if the legislature interfere, so as to render a performance as to part only of the thing contracted for illegal; the agreement will, nevertheless, be binding as to

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to the residue, * and a court of equity will enforce the execution of it; for, in such case a man is bound in conscience to do all that is in his power, the interposition of the legislature not discharging the parties from the performance of so much of the contract as remains lawful: therefore where a dean and chapter, before the disabling act made a lease of lands in *London* to build on for ninety-nine years, and covenanted to renew, at the expiration of that term, for ninety-nine years more; they were decreed, although the covenant was entire, to make such a lease as was in their power; namely, a lease for forty years, which was allowed by the statute of the 14 Eliz. c. 11. [* 446.]

Vide Dr. Bettesworth v. Dean and Chapter of St. Paul's, 2 Eq. Ca. Abr. 26. Ca. in Ch. 65. 3 Pro. Par. Ca. 389.

And a man may be discharged from his contract or agreement by the act of God; for when a thing is prescribed to be done or omitted, if, by the act of God, the thing stipulated become physically impossible, the person obliged shall not receive any prejudice for not executing what is stipulated, if every thing be performed without laches, that the parties might perform: because it would be unreasonable, that those things which are inevitable, which no industry can avoid, nor policy prevent, should be construed to the * prejudice of any person in whom there was no laches: as if a lessee covenant to leave a wood in as good plight as it was in at the time of the lease, and, afterwards, the trees are blown down by tempest, the covenant is discharged *quia impotentiam excusat legem*. [* 447.]

240 E. 3. 6. 2. Noy's Max. 35. 1 Rep. 98.

And there is no difference in this respect between a covenant and an assumpsit; for an assumpsit is a covenant *by parol*, and a covenant is an assumpsit *by deed*.

And the law is the same, where a thing which is due in specie, so that it cannot be discharged by an equivalent, is destroyed without any default in the debtor, or any delay in returning it.

Therefore, where in assumpsit, the plaintiff declared that, in consideration that he had lent a grey gelding to C. to his use to ride, &c. C. then and there promised to re-deliver it when required, but that he had not done so, although he had been required; and C. replied that the horse, in consequence of divers diseases, died, whereby it could not be re-delivered: this, on demurrer, was held a good plea; for, performance being

Williams v. Hide, et al. Palmer 548.

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[* 448.] ing become * impossible by the death of the horse, the contract was discharged.

Fitz. Dett. 143.
27 E. 3. 84.

So, if A. contract with B. to serve B for a year for 20s. to be paid at two several times, and B. die after the first time passed, and before the last time of payment; A. *shall be barred of the rest of the salary*; for, by the death of B. he cannot serve him, and, therefore, the contract is determined.

But although an agreement cannot, by reason of the act of God, be performed according to the words, the party shall, nevertheless, perform it as near the intent of the agreement as he can.

Chapman v.
Dalton, Plowd.
284.

This was so determined in the case of *Chapman* and *Dalton*, in *Plowden*. There, a covenant was made in a lease for twenty-one years, that the lessor, after the expiration of the said term, should make, or cause to be made to the lessee and his assigns, a further demise of the lands so letten for a term of twenty-one years, next and immediately following the aforesaid term of twenty-one years before named, in the said indenture aforesaid specified and contained, &c. The lessee died

[* 449.]

*within the first term: and the question was, whether the executor of the executrix of the lessee, had a right to call for the new lease. And it was contended that, by the death of the lessee, the covenant became impossible to be performed by the act of God; for, that the new lease ought to be made unto the lessee and his assigns, and he is dead before the time limited for the making it, and therefore the lease cannot be made according to the limitation; for it ought first to vest in the lessee, and the party ought not to perform it in other manner than the agreement was made. But it was contended on the other side and determined, that, admitting the meaning of assigns here to be, that it should be only to him and to his assigns, as *habendum* to him and his to assigns, so that assigns were words of limitation; yet the lessor ought to make the lease to the executor of the executrix of the first lessee, and that he should not be discharged of the covenant by the death of the first lessee to whom it was made: because the substance of the agreement was that the estate should be made, and that the interest should be had and the person to whom it should be made was not the principal point of the agreement. And when the lease was limited

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limited to be made at a * day to come, it was then [* 450.] known and considered by each of the parties, that he to whom the lease was made was subject to death, and that it was probable he might die before the lease was made. And therefore it could not be presumed that the party intended to have the agreement dissolved by his death, or that the other intended by such event to be discharged from making the lease; but it shall be presumed that it was the intent of both the parties that the lease should be made, notwithstanding the death of him that should take it. And he has left others behind him able to take the lease, viz. his executors; and he who is to make it receives no more damage by making it to the executor, than by making it to the testator. Therefore, although it is impossible for him to perform the covenant according to the words, yet he shall perform it according to the intent.

Upon the same principle, where a condition of a bond was to settle certain lands in such a manor by such a day, and the obligor died before the day, so that the bond was saved at law by the act of God; the lord chancellor notwithstanding decreed the lands to be settled; and so it has often been done.

* The parties to a contract or agreement, may discharge it by any collateral satisfaction agreed upon. As if A. be bound to B. to pay him 100*l.* B. may take [* 451.] any collateral satisfaction for it. 7 Mod. 144.

But the act of a third person will not vary a contract or agreement: as if A. bind himself in a bond, with a condition that a third person shall appear to an action upon eight days warning, and that if he be condemned, then A. will answer the condemnation. If the third person appear in an action without eight days notice, and is condemned, that shall not forfeit A.'s bond; for he being a third person, cannot do an action to alter the terms of A.'s agreement. So, if A. be bound to B. on condition to pay C. 100*l.* there C. shall not receive any collateral satisfaction to save the bond; for he cannot alter the terms of an agreement made between strangers.

So, if A. assume that, if B. who has taken out administration to C. will, at the instance of D. relinquish the administration, and consent that A. shall have it; that he will save D. harmless of a bond in which he

Holtham v.
Ryland, 1 Eq.
Ca. Abr. 18.
Ca. 8.

[* 451.]
7 Mod. 144.

Ibid.

Leate's case, W.
Jones 441.

OF DISANNULLING, &c.

[* 452.] is * indebted to C. and B. relinquish the administration, but not at the instance of D. this will not entitle D. to recover upon this assumpsit.

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